

TRANSCRIPT OF EVIDENCE

SUPREME COURT OF THE UNITED STATES

October Term, 1922

No. 508

WILLIAM W. MERCE, LIMITED, PLAINTIFF

vs.
WILLIAM WATERHOUSE AND ALBERT WATSON
DEFENDANTS UNDER THE WILL AND DEEDS
OF HENRY WATERHOUSE DECEASED

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA

FILED APRIL 14, 1923

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 508.

WILLIAM W. BIERCE, LIMITED, PLAINTIFF IN ERROR,

v's.

WILLIAM WATERHOUSE AND ALBERT WATERHOUSE,
EXECUTORS UNDER THE WILL AND OF THE ESTATE
OF HENRY WATERHOUSE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

INDEX.

	Original.	Print
Caption	a	1
Petition for writ of error to circuit court.	2	1
Notice of issuance of writ of error.	5	3
Assignment of errors, filed June 29, 1909.	6	4
Bond on writ of error.	10	5
Writ of error to circuit court.	14	7
Bill of exceptions from circuit court.	16	8
Testimony of James A. Thompson.	17	8
Plaintiff's Exhibit A—Complaint in replevin suit.	18	9
Exhibit A—Agreement of March 13, 1901.	25	14
Exhibit B—Promissory note of March 13, 1901.	27	15
Summons and return.	28	16
Affidavit of E. B. McClanahan.	30	17
Sheriff's return.	33	18
B—Replevin bond.	35	19
Return bond.	37	20
Stipulation as to redelivery bond.	40	21

	Original.	Print
Plaintiff's Exhibit C—Answer in replevin suit	43	23
D—Motion to amend complaint.....	46	24
Affidavit of E. B. McClanahan.....	48	25
E—Stipulation and order for change of venue.....	51	26
F—Motion for new trial and bond there- on.....	53	28
G—Findings of fact, March 19, 1904....	58	29
H—Conclusions of law, March 19, 1904..	63	32
I—Decision, March 19, 1904.....	66	33
J—Judgment, March 19, 1904.....	69	34
K—Order sustaining objection to suffi- ciency of bond on motion for new trial.....	73	36
L—Notice of motion for new redelivery bond	75	37
Motion for new redelivery bond....	76	38
M—Order requiring defendant to file new redelivery bond.....	78	38
N—Order extending time to file new re- delivery bond	80	39
O—Notice of motion for execution.....	82	40
Motion for execution	83	41
P—Order for execution	86	42
Q—Execution.....	89	43
Clerk's minutes.....	94	46
W—Judgment of supreme court, May 6, 1905.....	113	54
X—Order of Supreme Court of the United States allowing an appeal, December 4, 1905.....	115	55
Appeal bond.....	116	55
Order of Supreme Court of the United States allowing a super- sedeas	118	56
Motion for supersedeas.....	119	57
Affidavit of Wm. W. Bierce.....	120	57
Order for supersedeas.....	130	63
Certificate of clerk of Supreme Court of the United States.....	130	63
Assignment of errors.....	131	64
Y—Order setting aside judgment of May 6, 1905, &c.....	138	68
Mandate of Supreme Court of the United States.....	139	69
XX—Assignment of errors in Supreme Court of the United States.....	143	71
AA—Decision on exceptions, March 4, 1908	151	75
Notice of decision on exceptions....	152	76
BB—Petition for probate of will of Henry Waterhouse.....	154	77
Order for notice of hearing.....	158	79

INDEX.

III

Original. Print

Plaintiff's Exhibit BB—Continued.

Affidavit of publication	159	80
Order of probate.....	160	81
Letters testamentary.....	162	82
Will of Henry Waterhouse.....	163	83
Affidavit of publication of notice to creditors.....	166	84
Testimony of Henry Smith	167	85
Testimony of Albert Waterhouse.....	167	85
Plaintiff's Exhibit CC—Claim of Wm. W. Bierce, Limited, September 6, 1904.....	168	86
DD—Letter of Albert Waterhouse, execu- tor, to Kinney, McClanahan & Cooper, rejecting claim, Septem- ber 26, 1904.....	172	88
EE—Claim of Wm. W. Bierce, Limited, September 30, 1904.....	174	89
Return bond.....	176	90
Deposition of Columbus Bierce.....	178	92
Deposition of E. W. Holden.....	180	93
Plaintiff's Exhibit II—Exemplified record of the incorporation of Wm. W. Bierce, Limited, July 27, 1903.....	182	93
Testimony of J. A. Thompson (recalled).....	190	98
Testimony of F. B. McStocker.....	190	98
Plaintiff's Exhibit HH—Deed from Clinton J. Hutchins to Francis B. McStocker, Novem- ber 7, 1905.....	191	98
Testimony of George C. Kopa.....	194	99
Plaintiff's Exhibit JJ—Deed from F. L. Dortch to Clinton J. Hutchins, June 13, 1903.....	195	100
Testimony of J. M. McChesney.....	198	101
Letter of Wm. W. Bierce, Limited, to Kona Sugar Co., Limited, March 13, 1901.....	199	102
Amendment of complaint.....	201	103
Plaintiff rests.....	201	103
Motion of defendants to direct a verdict	202	103
Verdict.....	204	105
Motion of defendants for verdict <i>non obstante veredicto</i>	205	105
Motion for new trial.....	210	108
Judgment, May 29, 1908.....	217	112
Statement as to case going to Supreme Court of Hawaii.....	218	113
Opinion of Supreme Court of Hawaii by Ballou, J., April 12, 1909.....	220	114
Dissenting opinion of Wilder, J.....	231	121
Plea in abatement.....	234	123
Rehearing denied in Supreme Court of Hawaii.....	237	124
Decision on exceptions by Supreme Court of Hawaii, May 5, 1909.....	238	124
Notice of decision on exceptions by Supreme Court of Hawaii, May 5, 1909.....	240	125
Judgment on remittitur, May 29, 1909.....	242	126
Exception to judgment of May 29, 1909.....	245	127

	Original.	Print
Order allowing time to file bill of exceptions, June 1, 1909.....	247	128
Certified copies of pleadings made part of bill of exceptions....	248	128
Judge's certificate to bill of exceptions.....	248	128
Complaint.....	249	129
Exhibit A—Return bond.....	253	132
Demurrer to complaint.....	254	133
Amended complaint.....	257	135
Exhibit A—Return bond.....	262	138
Answer of Wm. and Albert Waterhouse, executors, &c.....	263	139
Clerk's certificate to pleadings.....	264	140
Plaintiff's Exhibit LL—Letter of Kinney, McClanahan & Cooper to Clinton J. Hutchins, April 26, 1904..	265	141
MM—Letter of J. D. Paris to J. K. Nahale, May 21, 1904.....	266	141
NN—Deed from Clinton J. Hutchins, trustee, to Henry Waterhouse Trust Company, June 13, 1903.....	267	142
A—Proposal of February 21, 1900, accepted February 22, 1900.....	273	146
Defendants' Exhibit 2—Letter of Kinney, McClanahan & Cooper to Clinton J. Hutchins, April 18, 1904.....	277	151
3—Letter of Clinton J. Hutchins to Kinney, McClanahan & Cooper, April 18, 1904.....	279	152
4—Letter of Kinney, McClanahan & Cooper to Clinton J. Hutchins, April 21, 1904.....	281	153
5—Letter of Kinney, McClanahan & Cooper to Clinton J. Hutchins, May 16, 1904.....	283	154
6—Letter of Cathcart & Milverton to Kinney, McClanahan & Cooper, May 26, 1904.....	285	155
6a—Letter of M. F. Scott to Kinney, Mc- Clanahan & Cooper, May 18, 1904...	286	156
7—Letter of Kinney, McClanahan & Cooper to Cathcart & Milverton, May 27, 1904.....	287	156
8—Letter of Cathcart & Milverton to Kinney, McClanahan & Cooper, May 27, 1904.....	289	157
9—Notice to Arthur M. Brown, high sheriff, served by Scott on Nahale, May 23, 1904.....	290	158
10—Letter of Kinney, McClanahan & Cooper to Wm. and Albert Water- house, September 30, 1904.....	292	159
11—Agreement or option from Wm. W. Bierce, Limited, to Kapiolani Estate, Limited, April 14, 1904.....	293	160
12—Letter of Kinney, McClanahan & Cooper to Kapiolani Estate, April 19, 1904.....	295	161

INDEX.

v

Original. Print

Petition of M. F. Scott, receiver, for order fixing priority of payment of claims of creditors in case of M. W. McChesney & Sons <i>vs.</i> Kona Sugar Co., Limited, <i>et al.</i>	296	161
Exhibit A—Agreement between bondholders, lessors, lienholders, and general creditors of Kona Sugar Co., Limited, May 15, 1902.....	300	163
B—Letter of committee of creditors to M. F. Scott, receiver, May 16, 1902.....	306	167
Order on petition of M. F. Scott, receiver, May 21, 1902.....	308	169
Release of Kapiolani Estate Limited, to Wm. W. Bierce, Limited, April 14, 1904.....	312	171
Minutes of clerk of Supreme Court of Hawaii, July 13, 1909....	315	172
Receipt for papers withdrawn.....	318	173
Judgment of Supreme Court of Hawaii, July 13, 1909.....	320	174
Stipulation to set aside judgment, &c.....	323	175
Order vacating judgment, August 3, 1909.....	326	176
Motion to quash writ of error.....	328	177
Appearance and substitution of counsel for plaintiff in error....	331	178
Clerk's minutes of September 27, 1909.....	333	179
Hearing upon motion to quash writ of error.....	336	180
Motion for writ of certiorari.....	341	183
Writ of certiorari.....	345	185
Return to writ of certiorari.....	347	186
Complaint in replevin suit.....	352	189
Exhibit A—Agreement of March 13, 1901.....	359	193
Exhibit B—Promissory note, March 13, 1901.....	361	194
Summons and return.....	362	195
Affidavit of E. B. McClanahan.....	364	196
Sheriff's return.....	367	197
Replevin bond.....	368	198
Return bond.....	370	200
Stipulation as to redelivery bond.....	372	201
Answer.....	374	202
Motion to amend complaint.....	376	203
Affidavit of E. B. McClanahan.....	378	204
Stipulation and order for change of venue.....	380	205
Replevin bond.....	382	206
Motion for new trial.....	384	207
Findings of fact.....	386	208
Conclusions of law.....	390	211
Decision, March 19, 1904.....	392	212
Judgment, March 19, 1904.....	394	213
Order sustaining objections to sufficiency of bond.....	397	215
Notice of motion for new redelivery bond.....	398	215
Motion for new redelivery bond.....	399	216
Affidavit of E. B. McClanahan.....	400	216
Affidavit of John F. Colburn.....	404	218
Affidavit of Percy M. Pond.....	406	219
Order requiring defendant to file new redelivery bond....	408	220
Order extending time to file new redelivery bond.....	409	221
Notice of motion for execution.....	410	221
Motion for execution.....	411	222
Affidavit of P. D. Kellett.....	413	223

	Original.	Print.
Affidavit of E. B. McClanahan.....	414	223
Order for execution.	418	225
Execution	420	226
Clerk's minutes.....	424	229
Certified copy of notice of decision on exceptions.....	438	236
Affidavit of publication.....	439	237
Notice to creditors.....	439	237
Deposition of Columbus Bierce.....	440	238
Exhibit Z—Notice of appointment of Frank Davies as manager of supply department, December 23, 1899	463	251
A—Proposal of February 21, 1900, and accept- ance of February 22, 1900.....	464	252
Y—Power of attorney, Wm. W. Bierce to H. T. Gilbert, April 5, 1901.....	470	256
B—Proposal and acceptance of March 13, 1901.	473	257
W—Promissory note of March 13, 1901, &c.	475	258
Deposition of Harry T. Gilbert.....	478	260
Exhibit Z—Notice of appointment of Frank Davies as manager, December 23, 1899.....	494	269
A—Proposal of February 21, 1900, and accept- ance of February 22, 1900.....	495	269
Y—Power of attorney, Wm. W. Bierce to H. T. Gilbert, April 5, 1901.....	499	275
B—Proposal and acceptance of March 13, 1901.	502	276
W—Promissory note of March 13, 1901, &c.	504	278
Claim of Wm. W. Bierce, Limited, September 6, 1904.....	508	281
Letter of Waterhouse, executor, rejecting claim, September 26, 1904.....	511	283
Claim of Wm. W. Bierce, Limited, September 30, 1904.	512	283
Commission to take testimony.....	516	286
Direct interrogatories to Columbus Bierce.....	518	287
Cross-interrogatories to Columbus Bierce	520	288
Direct interrogatories to E. W. Holden.....	522	289
Cross-interrogatories to E. W. Holden.....	524	290
Deposition of Columbus Bierce.....	526	291
Deposition of E. W. Holden.....	533	294
Commissioner's certificate..	535	296
Endorsements on depositions	537	297
Statement of account "GG".....	538	298
Deed, Clinton J. Hutchins to F. B. McStocker, November 7, 1905.....	539	298
Act of incorporation of Wm. W. Bierce, Limited.....	541	299
Deed, F. L. Dortch, receiver, &c., to Clinton J. Hutchins, trustee, June 13, 1903.....	549	304
Index to testimony	552	305
Testimony of J. A. Thompson.....	553	306
Proceedings, May 8, 1908.....	562	311
Testimony of J. A. Thompson (recalled).....	564	312
Offers of exhibits, &c.....	574	318
Testimony of Henry Smith	589	326
Albert Waterhouse	594	329

INDEX

VII

	Original.	Print
Testimony of F. B. McStocker.....	610	338
J. A. Thompson (recalled).....	618	343
F. B. McStocker (recalled).....	622	345
George C. Kupa.....	628	348
J. M. McChesney.....	630	349
Plaintiff rests.....	642	357
Motion to strike out evidence.....	643	357
Motion for nonsuit.....	644	357
Testimony of John W. Cathcart.....	648	359
M. F. Scott.....	681	378
E. E. Conant.....	741	415
Appendix to testimony of M. F. Scott.....	754	422
Testimony of J. A. Thompson (recalled).....	760	426
M. F. Scott (resumed).....	762	428
J. A. Thompson (recalled).....	766	430
Albert Waterhouse (recalled).....	790	444
J. A. Thompson (recalled).....	792	445
J. L. Horner (withdrawn).....	797	447
J. A. Thompson (recalled).....	797	447
R. W. Shingle.....	800	448
J. L. Horner (recalled).....	804	451
J. W. Cathcart (recalled).....	810	454
John D. Paris.....	815	457
H. E. Cooper.....	821	460
Henry E. Cooper (recalled).....	873	490
J. A. Thompson (recalled).....	886	499
H. E. Cooper (resumed).....	889	500
Plaintiff rests in rebuttal.....	895	504
Testimony of Robert L. Colburn.....	896	504
John F. Colburn.....	903	508
Frank Gerard.....	907	511
R. W. Shingle (recalled).....	916	516
Both sides rest.....	923	520
Motion to direct verdict for defendant, &c.....	924	520
Charge to the jury.....	925	521
Exceptions to charge.....	942	530
Stenographer's certificate.....	943	531
Hearing upon plaintiff's motion for a writ of certiorari.....	945	531
Order making bill of exceptions, &c., part of record.....	948	532
Return and certificate of clerk to foregoing order.....	950	533
Bill of exceptions of Waterhouse's executors.....	954	535
Exception No. A.....	956	536
Plea in abatement.....	957	536
No. B.....	961	538
Demurrer to amended complaint.....	962	538
No. C.....	966	540
Motion for continuance.....	967	540
Affidavit of A. G. M. Robertson.....	968	541
No. D.....	971	542
Motion for continuance.....	972	542
Affidavit of A. G. M. Robertson.....	974	543

	Original.	Print
Exception No. E.....	977	544
Motion for continuance and stay of proceedings.....	978	544
Affidavit of Henry W. Prouty.....	980	545
Affidavit of Henry W. Prouty.....	989	550
Exhibit A—Letter of H. W. Prouty to James H. McKenney, clerk of the Supreme Court of the United States, August 10, 1906.....	992	552
Exhibit B—Letter of James H. McKenney, clerk of the Supreme Court of the United States, to H. W. Prouty, August 13, 1906.....	993	552
Affidavit of A. G. M. Robertson.....	994	552
Affidavit of A. Lewis, Jr.....	997	554
No. F.....	1000	555
No. I.....	1003	556
Notice of motion to set cause for trial... ..	1001	555
Complaint in replevin suit	1004	556
Exhibit A—Agreement of Mar. 13, 1901.	1011	561
Exhibit B—Promissory note of March 13, 1901.....	1013	562
No. II.....	1015	563
Return bond	1016	563
No. III.....	1018	564
Replevin bond.....	1019	565
No. IV.....	1021	566
Stipulation as to redelivery bond.....	1022	567
No. V.....	1024	568
Judgment of March 19, 1904.....	1025	568
No. VI.....	1028	570
Motion for new redelivery bond.....	1030	570
Notice of motion for new redelivery bond.	1031	571
No. VII.....	1032	572
Execution	1033	572
No. VIII.....	1037	574
Assignment of errors.....	1038	575
No. IX.....	1045	579
Petition for probate of Waterhouse will.	1046	579
Order for notice of hearing of petition for probate.....	1050	582
Affidavit of publication.....	1051	582
No. X—Smith's testimony.....	1052	584
No. XI.....	1052	584
Claim of Wm. W. Bierce, Limited, September 6, 1904.....	1053	585
No. XII—Waterhouse's testimony.....	1056	588
No. XIII—Waterhouse's testimony.....	1057	588
No. XIV—Waterhouse's testimony.....	1057	588
Claim of Wm. W. Bierce, Limited, September 30, 1904.....	1058	589
Return bond	1060	590

INDEX.

ix

	Original.	Print.
Exception No. XV—Waterhouse's testimony.....	1062	592
No. XVI—Waterhouse's testimony.....	1062	592
No. XVII.....	1063	593
Testimony of F. B. McStocker.....	1064	594
No. XVIII—McStocker's testimony.....	1067	594
No. XIX—McStocker's testimony.....	1071	595
No. XX.....	1071	595
Act of incorporation of Wm. W. Bierce, Limited	1072	596
No. XXI—Thompson's testimony.....	1079	600
No. XXII—Thompson's testimony.....	1080	601
No. XXIII.....	1080	601
Deed, Hutchins to McStocker, November 7, 1905	1081	601
No. XXIV.....	1085	603
Deed, Dortch to Hutchins, June 13, 1903.....	1086	603
No. XXV.....	1090	604
Agreement of March 13, 1901.....	1091	605
No. XXVI—McChesney's testimony.....	1094	606
No. XXVII—McChesney's testimony.....	1094	606
No. XXVIII—Amendment of complaint.....	1095	607
No. XXIX—Motion to strike.....	1096	608
No. XXX.....	1097	608
Motion for nonsuit.....	1098	608
No. 31—Cathcart's testimony.....	1103	610
No. 32—Cathcart's testimony.....	1103	610
No. 33—Cathcart's testimony.....	1104	611
No. 34.....	1105	611
Letter of Kinney, McClanahan & Cooper to Clinton J. Hutchins, April 26, 1904..	1106	611
No. 35—Scott's testimony.....	1107	612
No. 36—Scott's testimony.....	1108	613
No. 37—Scott's testimony.....	1109	613
No. 38.....	1109	614
Petition of M. F. Scott, receiver, for an order fixing priority of payment of claims of creditors	1111	614
Exhibit A—Agreement of creditors, May 15, 1902.....	1115	616
Exhibit B—Letter of committee to receiver, May 16, 1902.....	1121	620
Order on petition of receiver, May 21, 1902.....	1123	622
Exception No. 39—Scott's testimony.....	1128	625
No. 40—Scott's testimony.....	1128	625
No. 41—Scott's testimony.....	1129	625
No. 42—Scott's testimony.....	1130	626
No. 43—Scott's testimony.....	1130	626
No. 44—Scott's testimony.....	1131	627
No. 45—Scott's testimony.....	1132	627
No. 46—Scott's testimony.....	1132	628
No. 47—Scott's testimony.....	1133	628
No. 48—Scott's testimony.....	1134	629

	Original.	Print
Exception No. 49—Scott's testimony.....	1134	629
No. 50—Scott's testimony.....	1135	630
No. 51—Scott's testimony.....	1135	630
No. 52—Scott's testimony.....	1148	636
No. 53—Scott's testimony.....	1149	637
No. 54—Cathcart's testimony.....	1149	637
No. 55—Cathcart's testimony.....	1150	638
No. 56.....	1150	638
Letter of J. D. Paris <i>et al.</i> to J. K. Nahale, May 21, 1904.....	1152	639
No. 57—Paris' testimony.....	1153	639
No. 58—Paris' testimony.....	1153	639
No. 59—Paris' testimony.....	1154	640
No. 60—Paris' testimony.....	1154	640
No. 61—Cooper's testimony.....	1155	640
No. 62—Cooper's testimony.....	1155	641
No. LXIII—Cooper's testimony.....	1157	641
No. LXIV—Cooper's testimony.....	1157	642
No. LXV—Cooper's testimony.....	1158	642
No. LXVI.....	1158	643
Deed, Hutchins, trustee, to Henry Waterhouse Trust Co., June 13, 1903.....	1159	643
No. LXVII—Cooper's testimony.....	1165	647
No. LXVIII—Cooper's testimony.....	1166	647
No. LXIX—Cooper's testimony.....	1166	647
No. LXX—Cooper's testimony.....	1167	648
No. LXXI—Cooper's testimony.....	1168	649
No. LXXII—Colburn's testimony.....	1168	649
No. LXXIII—Colburn's testimony.....	1169	650
No. LXXIV—Shingle's testimony.....	1169	650
No. LXXV—Shingle's testimony.....	1170	651
No. LXXVI—Motion for verdict.....	1170	651
No. 77—Defendant's requests.....	1172	651
No. 78—Defendant's requests.....	1172	652
No. 79—Defendant's requests.....	1172	652
No. 80—Defendant's requests.....	1173	652
No. 81—Defendant's requests.....	1174	653
No. 82—Defendant's requests.....	1174	653
No. 83—Defendant's requests.....	1175	654
No. 84—Defendant's requests.....	1175	654
No. 85—Defendant's requests.....	1176	654
No. 86—Defendant's requests.....	1177	655
No. 87—Defendant's requests.....	1177	655
No. 88—Defendant's requests.....	1178	656
No. 89—Defendant's requests.....	1179	656
No. 90—Defendant's requests.....	1179	656
No. 91—Defendant's requests.....	1180	657
No. 92—Defendant's requests.....	1180	657
No. 93—Defendant's requests.....	1181	657
No. 94 (as amended)—Defendant's requests....	1182	658
No. 95—Defendant's requests.....	1184	659
No. 96—Instructions given.....	1185	659

INDEX

xi

Original. Print

Exception No. 97—Instructions given.....	1188	661
No. 98—Instructions given.....	1189	662
No. 99—Instructions given.....	1189	662
No. 100—Instructions given.....	1190	662
No. 101—Instructions given.....	1191	663
No. 102—Instructions given.....	1191	663
No. 103—Instructions given.....	1192	664
No. 104—Instructions given.....	1193	664
No. 105—Instructions given.....	1194	665
No. 106—Instructions given.....	1194	665
No. 107—Instructions given.....	1195	665
No. 108—Instructions given.....	1195	666
No. 109—Instructions given.....	1196	666
No. 110—Instructions given.....	1197	667
No. 111—Instructions given.....	1197	667
No. 112—Instructions given.....	1198	667
No. 113—Instructions given.....	1198	668
No. 114—Instructions given.....	1199	668
No. 115—Instructions given.....	1200	668
No. 116—Instructions given.....	1200	669
No. 117—Instructions given.....	1201	669
No. 118—Instructions given.....	1201	669
No. 119—Instructions given.....	1202	670
No. 120—Instructions given.....	1202	670
No. 121—Instructions given.....	1203	671
No. 122—Instructions given.....	1204	671
No. 123—Instructions given.....	1204	671
No. 124—Verdict	1206	672
No. 124a—Jury requests papers.....	1207	673
No. 125—Motion for judgment <i>non obstante veredicto</i>	1208	673
No. 126—Motion for new trial.....	1213	676
No. 127—Judgment, May 29, 1908.....	1221	680
Judge's certificate to bill of exceptions.....	1224	681
Order approving foregoing bill of exceptions and incorporating therein all files, records, exhibits, and testimony..	1225	682
Caption to transcript of record on exceptions from the circuit court at October term, 1908.....	1229	686
Index	1230	686
Complaint.....	1232	687
Exhibit A—Return bond.....	1236	690
Plea in abatement.....	1238	691
Amended complaint.....	1241	693
Exhibit A—Return bond.....	1246	696
Demurrer of executors to amended complaint.....	1248	697
Answer of executors to amended complaint.....	1251	699
Motion for continuance	1252	700
Affidavit of A. G. M. Robertson	1253	700
Motion for continuance.....	1255	701
Affidavit of A. G. M. Robertson.....	1257	702
Affidavit of A. Lewis, Jr.....	1259	703
Notice of motion to set cause for trial.....	1261	704
Instructions requested by plaintiff.....	1262	705

	Original.	Print
Defendants' instructions No. A.....	1306	719
Instructions requested by defendants, executors of Waterhouse.	1307	719
Verdict.....	1331	726
Motion for judgment <i>non obstante veredicto</i>	1332	727
Motion for new trial.....	1337	729
Judgment, May 29, 1908.....	1344	733
Clerk's minutes, January 3, 1906.....	1346	734
April 4 and 6, 1906.....	1347	735
September 6, 1906.....	1349	736
May 22, 1908.....	1350	737
May 26, 1908.....	1353	739
June 1, 1908.....	1353	739
Subpoena to J. F. Colburn and return.....	1355	740
Præcipe for transcript.....	1356	741
Clerk's certificate to transcript.....	1358	742
Judgment of Supreme Court of Hawaii, May 6, 1905.....	1360	743
Order of the Supreme Court of the United States allowing appeal, December 4, 1905.....	1361	744
Appeal bond of January 13, 1906.....	1362	745
Order of the Supreme Court of the United States granting super- sedeas, March 5, 1906.....	1364	746
Motion for writ of supersedeas, filed in the Supreme Court of the United States February 28, 1906.....	1365	746
Affidavit of Wm. W. Bierce.....	1366	747
Order granting supersedeas.....	1376	753
Clerk's certificate.....	1376	753
Assignment of errors, filed January 13, 1906.....	1377	753
Mandate of the Supreme Court of the United States, dated May 25, 1907.....	1383	757
Order on mandate, September 27, 1907.....	1386	759
Decision on exceptions, March 4, 1908.....	1387	760
Notice of decision on exceptions.....	1388	761
Assignment of errors, filed May 7, 1908.....	1389	761
Order denying motion to dismiss and affirming judgment, November 6, 1909.....	1397	765
Order denying motion to quash writ of error, November 23, 1909...	1399	766
Judgment of November 23, 1909.....	1401	767
Petition for writ of error.....	1404	768
Allowance of writ of error.....	1405	769
Assignment of errors, filed December 21, 1909.....	1408	769
Bond on writ of error.....	1414	771
Writ of error (copy).....	1417	773
Citation (copy).....	1420	774
Rules of Supreme Court of Hawaii in force March 21, 1906.....	1422	775
Clerk's certificate to transcript of record.....	1430	780
Writ of error (original).....	1431	781
Citation and service (original).....	1432	782
Opinion, November 6, 1909.....	1433	783
Clerk's certificate to opinion.....	1442	788

a In the Supreme Court of the Territory of Hawaii, October Term, 1909.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

In Error to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii.

Transcript of Record.

1 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

In Error to Circuit Court, First Circuit, Territory of Hawaii.

Transcript of Record.

Be it remembered that heretofore, to wit: on the 29th day of June, A. D. 1909, came William W. Bierce, Limited, by its Attorney, and filed in the office of the clerk of the Supreme Court of the Territory of Hawaii, its petition for a writ of error, which said petition is in the words and figures to wit:

2 In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1908.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Error to Circuit Court, First Circuit.

(\$2.00 Stamps.)

Petition for Writ of Error.

Now comes the above named William W. Bierce, Limited, plaintiff in error, and respectfully represents that in the record and pro-

ceedings in a certain action of *assumpsit* lately pending in the Circuit Court for the First Judicial Circuit of the Territory of Hawaii, wherein the above named William W. Bierce, Limited, was plaintiff and the above named William Waterhouse and Albert Waterhouse, Executors under the will and of the Estate of Henry Waterhouse, deceased, were defendants, and in the rendition of the final judgment *non obstante veredicto* for the defendants and for \$1097.22 statutory attorney's fees and costs of suit against the plaintiff in said cause, manifest errors have intervened to the great injury of this petitioner, which said errors are specifically set forth in the Assignment of Errors filed with this petition, to which reference is hereby made; and that said final judgment was rendered on the 29th day of May, A. D. 1909, and that six (6) months have not elapsed since the rendition of said judgment; that execution on said judgment has not been fully satisfied and that a writ of error is not asked because of any defect of form merely in any declaration nor for any matter held for the benefit of the plaintiff in error.

Wherefore, petitioner prays that a Writ of Error may be issued out of this Honorable Court, directed to the Clerk of said Circuit Court, in pursuance of the statute in such case made and provided, commanding him to send up the record, proceedings and judgment aforesaid, from said Circuit Court to the Supreme Court of the Territory of Hawaii, and that the same may be in and by said Supreme Court, inspected, reviewed and considered, and that thereupon, the errors aforesaid, and each and every one of them may be corrected as justice and the law of the land may require.

WILLIAM W. BIERCE, LIMITED,

(Signed) By Its Attorney, A. G. M. ROBERTSON.

Dated, Honolulu, June 29th, 1909.

TERRITORY OF HAWAII,

City and County of Honolulu, ss:

Personally appeared A. G. M. Robertson, who, being duly sworn, deposes and says that he is attorney for the above named William W. Bierce, Limited, plaintiff in error; that he has read the foregoing petition, knows the contents thereof, and that the allegations therein are true.

(Signed)

A. G. M. ROBERTSON.

Subscribed and sworn to before me this 29th day of June, A. D. 1909.

(Signed) HENRY SMITH,

Clerk Supreme Court, Ter. Haw.

Endorsed: No. 434. Supreme Court, Territory of Hawaii. October Term, A. D. 1908. Error to Circuit Court, First Circuit. William W. Bierce, Limited, Plaintiff in Error, vs. William Waterhouse and Albert Waterhouse, Executors under the will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error. Petition for Writ of Error. Filed June 29, 1909, at 10:15 o'clock A. M. J. A. Thompson, Clerk. A. G. M. Robertson, Att'y for Plaintiff in Error.

4 On the same day, to wit, the 29th day of June, A. D. 1909, came William W. Bierce, Limited, by its attorney, and filed in the clerk's office of said court, Notice of the Issuance of said Writ of Error and its Assignment of Errors, and acceptance of service of the said notice of Issuance of Writ of Error and copy of said Assignment of Errors, which said Notice of the Issuance of the Writ of Error and Assignment of Errors and Acceptance of Service are in the words and figures following to wit:

5 In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1908.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,

vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Error to Circuit Court, First Circuit.

Notice of Issuance of Writ of Error.

To the above-named defendants in error:

You and each of you will take notice that a Writ of Error in the above entitled cause has been issued by the Clerk of the Judiciary Department of the Territory of Hawaii on this 29th day of June, A. D. 1909, upon the application of the above named plaintiff in error, for the removal of the record, proceedings and judgment in the original cause, from the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, to the Supreme Court of the Territory of Hawaii, and that a correct and true copy of the Assignment of Errors filed at the time of procuring said Writ of Error, is hereunto attached and herewith served upon you; which cause is still pending.

Dated, Honolulu, this 29th day of June, A. D. 1909.

(Signed)

A. G. M. ROBERTSON,
Attorney for Plaintiff in Error.

We hereby accept service of the foregoing notice of issuance of Writ of Error and copy of Assignment of Errors thereto attached; this 29th day of June, A. D. 1909.

(Signed)

SMITH & LEWIS,
CASTLE & WITHINGTON,
J. W. CATHCART,
Attorneys for Defendants in Error.

6 In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1908.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Error to Circuit Court, First Circuit.

Assignment of Errors.

And now comes William W. Bierce, Limited, by A. G. M. Robertson, its attorney, and says that in the record and proceedings of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in a cause, wherein William W. Bierce, Limited, was plaintiff, and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, were defendants, and in the rendition of the final judgment in said cause for said William Waterhouse and Albert Waterhouse, Executors as aforesaid, and against said William W. Bierce, Limited, there is manifest error, to the great prejudice and injury of said William W. Bierce, Limited, in the following among other things, to wit:

1. Said Circuit Court erred in allowing the motion of the defendants for judgment *non obstante veredicto* in said cause.

2. Said Circuit Court erred in allowing said motion and in rendering said judgment, in ruling that the plaintiff's amendments of the averments of the value of the property in question, as contained in the complaint as amended in the action of replevin in question, operated to discharge the defendants from liability for the demand sued for in said cause.

3. Said Circuit Court erred in entering said judgment, in ruling that the sureties on the bond sued on in said cause were discharged from liability by the amendments of the averments of the value of the property in question in the complaint in the action of replevin in question.

4. Said Circuit Court erred in rendering and entering judgment *non obstante veredicto* for the defendants in said cause.

5. Said Circuit Court erred in rendering judgment *non obstante veredicto* for the defendants in said cause and for statutory attorneys' fees and costs of suit as taxed, against the plaintiff.

6. Said Circuit Court erred in rendering judgment *non obstante veredicto* in said cause in favor of the defendants and against the plaintiff and in adjudging that the judgment entered in said cause on the verdict on the 29th day of May, A. D. 1908, be vacated and set aside and in adjudging that the plaintiff take nothing by its writ and that the defendants recover from the plaintiff their statutory attorneys' fees and costs of suit as taxed.

7. Said Circuit Court erred in vacating and setting aside the judgment entered on the verdict in said cause on the 29th day of

May, A. D. 1908, for the plaintiff and against the defendants, for the plaintiff's damages as assessed by the jury and for statutory attorneys' fees and costs of suit as taxed.

Wherefore, the said plaintiff in error prays that for the errors aforesaid, the said judgment *non obstante veredicto* of the said Circuit Court, be reversed, annulled and for naught held, and that this cause may be remanded to said Circuit Court with directions that said errors be corrected and that judgment be entered upon the verdict rendered by the jury on the trial of said cause for the plaintiff and against the defendants, for the plaintiff's damages as assessed by the jury, and for statutory attorneys' fees and costs of suit as taxed, to the end that justice may be done in the premises.

Dated, Honolulu, June 29th, 1909.

(Signed)

A. G. M. ROBERTSON,
Attorney for Plaintiff in Error.

Endorsed: No. 434. Supreme Court Territory of Hawaii. October Term, A. D. 1908. Error to Circuit Court, First Circuit. William W. Bierce, Limited, Plaintiff in Error, vs. William Waterhouse, et al., Ex'rs, Etc. Defendants in Error. Notice of Issuance of Writ of Error, & Assignment of Errors Attached -hereto. Filed June 29, 1909, at 10:15 A. M.: J. A. Thompson, Clerk. A. G. M. Robertson, Att'y for Plaintiff in Error.

On the same day, to wit: the 29th day of June, A. D. 1909, came William W. Bierce, Limited, as principal, and the Fidelity and Deposit Company of Maryland, as surety, and filed in the clerk's office of said Court, a bond on writ of error, which said bond is in the words and figures following, to wit:

In the Supreme Court of the Territory of Hawaii.

\$1.00 stamp.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Bond on Writ of Error.

Know all men by these presents, that we, William W. Bierce, Limited, a Corporation, as principal and Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto William Waterhouse and Albert Waterhouse, Executors under the will and of the estate of Henry Waterhouse, deceased, in the penal sum of Three Thousand Dollars (\$3,000.00), lawful money of the United States, for the payment of which well and truly to be made,

we bind ourselves, our successors, heirs, executors and administrators, jointly severally and firmly by these presents.

Witness our hands and seals this 29th day of June, A. D. 1909.

The condition of the above obligation is such, that whereas, the said William Waterhouse and Albert Waterhouse, Executors as aforesaid, did on the 29th day of May, A. D. 1909, in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii and of the January, term thereof, A. D. 1909, recover a judgment against the said William W. Bierce, Limited, for the sum of one thousand and ninety-seven and 22/100 (\$1097.22) Dollars, attorneys' fees and costs of suit, from which said judgment of the Circuit Court

11 aforesaid, the said William W. Bierce, Limited, is about to sue out a writ of error from the Supreme Court of the Territory of Hawaii.

Now therefore, if the said William W. Bierce, Limited, shall duly prosecute its said writ of error with effect, and moreover pay the amount of the said judgment in said original cause in case of its failure to sustain the said writ of error, then the above obligation to be void, otherwise to remain in full force and virtue.

WILLIAM W. BIERCE, LIMITED,
(Signed) By COLUMBUS BIERCE, *Vice-President.*

Attest:

(Signed) E. W. HOLDEN,
[SEAL.] *Secretary.*

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
(Signed) By ARTHUR BERG,
Attorney in Fact. [SEAL.]
(Signed) By M. MACINTYRE, *Agent.*

Endorsed: No. 434. Supreme Court Territory of Hawaii. October Term, A. D. 1908. Error to Circuit Court, First Circuit. William W. Bierce, Limited, Plaintiff in Error, vs. William Waterhouse, et al., Ex'rs, etc., Defendants in Error. Bond on Writ of Error. Filed June 29, 1909, at 10:15 o'clock A. M. J. A. Thompson, Clerk. A. G. M. Robertson, Att'y for Plaintiff in Error.

12 Thereupon, on the same day, to wit, the 29th day of June, A. D. 1909, there was issued by the Clerk of the Supreme Court of the Territory of Hawaii, a Writ of Error, for the transmission of the record and the exhibits filed in the said original cause from the Circuit Court of the First Judicial Circuit of the Territory of Hawaii to the Supreme Court of the Territory of Hawaii, which said Writ of Error and the record and exhibits filed in said original cause returned and filed therewith on the 30th day of June, A. D. 1909 in the clerk's office of said Supreme Court, are in the words and figures following, to wit:

13

Law. 6023.

WILLIAM W. BIERCE, LTD.,

vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

- a. Plaintiff's Bill of Exceptions.
- b. Transcript of Record.
- c. Plaintiff's Exhibits *LL, MM, NN*.
- d. Defendants' Exhibits *1, 2, 3, 4, 5, 6, 6A, 7, 8, 9, 10, 11 and 12*.

NOTE.—(Def'ts' Exhibit No. 1 is attached to Depositions of Columbus Bierce and Harry T. Gilbert in Equity Record No. 1337, being Exhibit "A" dated Feb. 21st, 1900 signed by Frank Davis.)

- e. Defendants' Exhibits for Identification *9, 10 and 22*.

14 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,

v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendant- in Error.

Writ of Error.

(\$2.00 Stamps.)

THE TERRITORY OF HAWAII:

To Job Batchelor, Esquire, Clerk Circuit Court, First Judicial Circuit:

Whereas, in an action lately pending before the Circuit Court of the First Judicial Circuit, in which the said William W. Bierce, Limited was plaintiff, and the said William Waterhouse and Albert Waterhouse, executors under the will and of the Estate of Henry Waterhouse, deceased, were defendants, error is alleged to have occurred as appears by the assignment of errors on file in this Court, you are commanded forthwith to send up to this Court the record and the exhibits filed in said proceedings.

Witness, the Hon. Alfred S. Hartwell Chief Justice of the Supreme Court, at Honolulu, Territory of Hawaii, this 29th day of June, 1909.

By the Court:

[SEAL.]

(Signed)

J. A. THOMPSON,
Clerk Supreme Court.

- 15 In obedience to the within writ to me directed, I herewith send up the record and all the exhibits filed in said above mentioned cause.

(Signed)

JOB BATCHELOR,
Clerk Circuit Court, First Circuit.

Dated June 30th, 1909.

Endorsed: No. 434. Supreme Court, Territory of Hawaii. William W. Bierce, Ltd., Plaintiff in Error, v. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, Defendants in Error. Writ of Error. Issued at 10:20 o'clock A. M. June 29, 1909. J. A. Thompson, Clerk. Returned at 3:55 o'clock P. M. June 30, 1909. J. A. Thompson, Clerk.

- 16 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term, 1909.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Bill of Exceptions of William W. Bierce, Limited, Plaintiff.

Be it remembered that the above entitled cause is now pending in the above entitled Court, A. G. M. Robertson, Esq., appearing for the plaintiff, and Messrs. Castle & Withington, Smith & Lewis, and John W. Cathcart, Esq., appearing for the defendants;

Be it further remembered that the said cause came on regularly for trial in the above entitled court on the 7th day of May, A. D. 1908, before the Honorable J. T. De Bolt, First Judge, presiding, and a jury duly sworn; that upon the objection of the defendants to the introduction of any testimony because of the alleged misjoinder of Clinton J. Hutchins, trustee, principal in the bond in suit, and A. B. Wood, a surety in said bond, with the said defendant executors, as defendants in the same action, the plaintiff discontinued the action as to the said Clinton J. Hutchins, trustee,

- 17 and said A. B. Wood, and thereupon the trial proceeded as to the present defendants:

The plaintiff thereupon called as a witness JAMES A. THOMPSON, who, after being duly sworn, testified that he is, and since July 1895, has been a clerk of the Supreme Court of the Territory of Hawaii and clerk of the Circuit Court of the First Circuit, and as such is one of the custodians of the records of said Courts; that he had with him, the record of the case in an action of replevin, being Number 5782, Law Division, entitled "William W. Bierce, Limited, against Clinton J. Hutchins, Trustee, of said Circuit Court files,

and, included therein, plaintiff's original complaint together with the term summons and the sheriff's return of service, also plaintiff's replevin affidavit, also the order to the sheriff to seize the property mentioned in the affidavit and the return of the sheriff thereon, and plaintiff's motion for the issuance of execution; that plaintiff thereupon offered in evidence the complaint in said replevin action and said term summons, the return of service, and plaintiff's affidavit, and the same were received and read in evidence and marked "Plaintiff's Exhibit A," the said documents respectively being in words and figures, as follows:

18 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

(\$2.00 Stamps.)

Replevin.

Complaint.

Now comes William W. Bierce Limited, plaintiff herein, by its attorneys Kinney & McClanahan, and complains of Clinton J. Hutchins Trustee and for cause of action shows:

1.

The plaintiff is a corporation duly organized and existing under the laws of the State of Louisiana and having its principal place of business in the City of Chicago in the State of Illinois.

2.

That the defendant is a resident of Honolulu, Island of Oahu, Territory of Hawaii, and a citizen of the said Territory of Hawaii.

3.

That on or about February 21st A. D. 1900 the said plaintiff agreed to furnish to the Kona Sugar Co. Ltd., a corporation duly organized and existing under the laws of the Territory of Hawaii, certain rails, engines, cars and other goods and merchandise for use on the plantation of the said Kona Sugar Co. Ltd. in the District of Kona, Island and Territory of Hawaii, at prices specified in the said agreement, which prices the said Kona Sugar Co. Ltd. agreed in writing to pay in cash upon the presentation of a demand draft attached to the bill of lading issued by the initial railroad, showing the said goods and merchandise to have been shipped through to the city of Honolulu, Island of Oahu, Territory of Hawaii.

4.

That in pursuance of the said agreement said plaintiff proceeded to ship the articles mentioned in said agreement to said Honolulu; that upon shipment of said goods and merchandise demand was made upon the said Kona Sugar Co. Ltd. for the payment of the price thereof in accordance with the terms of the agreement before mentioned. That the said Kona Sugar Co. Ltd., failed, neglected and refused to pay the said price or any part thereof; that because of this said failure on the part of the Kona Sugar Co. Ltd., the said goods and merchandise were not upon their arrival at said Honolulu nor at any other time, save as hereinafter mentioned, delivered to the said Kona Sugar Co. Ltd., nor was the title to said goods and merchandise or the right of property therein or the title or right of property of or in any part thereof ever transferred or taken from plaintiff, but that plaintiff retained both the title and possession and the right to the possession of the said goods and merchandise and each and all of them and every part thereof, and refused to permit them or any of them to pass into the possession of the said Kona Sugar Co. Ltd., except as hereinafter stated, nor did they or any of them in fact pass into the possession of the Kona Sugar Co. Ltd., except as hereinafter stated.

20

5.

Amendment allowed by the Court this 7th day of March, 1904.—(Sig.) P. D. Kellett, Jr., Clerk.

That thereafter, to wit on or about said agreement of February 21, 1900, was adjusted and settled by a contract in writing March 13th, 1901, [a supplementary contract in writing was]* entered into between the said Wil-

liam W. Bierce, Ltd. and the said Kona Sugar Co. Ltd., whereby the said William W. Bierce Ltd. offered in writing to permit the said Kona Sugar Co. Ltd., to take possession of the said rails, engines, cars and other goods and merchandise mentioned and to use the same upon the payment of \$10,000.00 Gold Coin to the said William W. Bierce Ltd. and the execution of a promissory note by the said Kona Sugar Co. Ltd. to the said William W. Bierce Ltd. for \$37,044.53, payable six months from date, upon the express condition, understanding and agreement that the said goods and merchandise should not become the property of the said Kona Sugar Co. Ltd., until the payment of the said note; which said offer and each and all of the terms and conditions thereof were accepted in writing by the said Kona Sugar Co. Ltd. upon the 13th day of March A. D. 1901 and a promissory note for \$37,044.53 payable six months after date to the order of William W. Bierce Ltd. was duly executed and delivered by the said Kona Sugar Co. Ltd., to the said William W. Bierce Ltd. Copies of said contract and note, marked respectively Exhibit "A" and Exhibit "B" are hereto attached referred to and made a part hereof.

[* Words enclosed in brackets erased in copy.]

6.

Amendment allowed by the Court this 7th day of March, 1904.—(Sig.) P. D. Kellett, Jr., Clerk.

That thereafter, in accordance with the terms of said [supplementary]* of March 13th 1901

Ltd., did in fact take possession of the following goods and merchandise, to-wit:

21 362 tons of steel T. rails weighing 35 lbs. to the yard.

Joints for laying 550 tons of Steel T. rails.

Railroad tract spikes to lay 550 tons of said rails.

10 sets of 35 lb. split switch material, complete.

16 cars, 25 feet long, 7 feet wide for 3 ft. gauge track.

One 9 x 14 Class "A" saddle tank locomotive.

One 10 x 16 back saddle tank locomotive.

One Howe Narrow gauge track scale, capacity 25 tons.

One set re-railers.

Four track gaugers, 3 feet.

One rail bender.

One track drill.

One section car with seats.

Two jacks.

Which said rails, cars, engines and other goods and merchandise as above enumerated were then and continued to be the property of the said William W. Bierce Ltd.; that the said Kona Sugar Co. Ltd., failed upon September 13th, 1901, said date being six months from the date of the execution of the promissory note mentioned to pay the said note or the sum therein mentioned or any part thereof, nor has it the said Kona Sugar Co. Ltd. at any time since said date nor at any time, though thereto often requested by plaintiff, paid the said note or the sum therein mentioned or any part thereof nor has any third person for or on behalf of the said Kona Sugar Co. Ltd. or otherwise paid the said note or the sum therein mentioned or any part thereof.

7.

Amendment allowed by the Court this 7th day of March, 1804.—(Sig.) P. D. Kellett, Jr., Clerk.

That from the date of said [supplementary]* contract A of and up to the 1st day of June A. D. 1903, the aforesaid property was at all times in the possession and control of the Kona

Sugar Co. Ltd. or the Receivers of the said Kona Sugar Co. Ltd. duly appointed.

[* Words enclosed in brackets erased in copy.]

That on or about the 1st day of April A. D. 1903, the Honorable W. S. Edings, Judge of the Circuit Court of the Third Circuit, sitting at Chambers in Equity, in that certain case of R. W. McChesney et al. vs. The Kona Sugar Co. Ltd. et al, ordered F. L. Dortch, then Receiver of the Kona Sugar Co. Ltd. to sell all the property, both real and personal of the said Kona Sugar Co. Ltd.; that in pursuance of the said order the said F. L. Dortch proceeded to offer for sale and on the 9th day of May A. D. 1903, did sell the property of the Kona Sugar Co. Ltd., aforesaid, but that the said F. L. Dortch did not and could not sell the rails, cars, engines and goods and merchandise hereinabove more particularly described for the reason that the same were then and now are the property of William W. Bierce, Ltd., plaintiff herein.

9.

That at the said sale of the property of the Kona Sugar Co. Ltd. the defendant C. J. Hutchins Trustee became the purchaser of the said property of the Kona Sugar Company Ltd.; that on June 1st, A. D. 1903, the Honorable W. S. Edings, Judge of the Circuit Court of the Third Circuit sitting at Chambers in Equity made an order confirming the said sale; and that thereupon the defendant proceeded to and did take possession of all the property, real and personal, belonging to the Kona Sugar Co. Ltd.

10.

That the said defendant in addition to taking possession of the property of the Kona Sugar Co. Ltd. also took possession and control of the rails, engines, cars and other goods and merchandise hereinbefore more particularly described, belonging to plaintiff, and still retains possession and control of the same which said
23 taking and retaining of the possession of the said rails, engines, cars and the other goods and merchandise hereinbefore more particularly described were unlawful and in contravention of the rights of plaintiff under the law.

11.

That the said rails, cars, engines and goods and merchandise hereinbefore more particularly described have been at all times mentioned in this complaint and now are the property of plaintiff and it has been and still is the true and lawful owner thereof and is entitled to the exclusive and immediate possession thereof.

12.

That the said William W. Bierce Ltd. has demanded of said defendant the return of all and singular the property aforesaid; but that said defendant has failed, neglected and refused and still fails, neglects and refuses to return the said property or any portion

thereof; that the said property was wrongfully taken and now is wrongfully detained by said defendant contrary to the rights of plaintiff therein; that the said property was taken by defendant and is now detained by defendant in the District of Kona, Island and Territory of Hawaii, and within the jurisdiction of this Honorable Court.

13.

That the said property has not been taken for a tax assessment or pursuant to a statute or seized under an execution or an attachment against the property of the plaintiff.

14.

That the actual value of the said property is [Twenty-two Thousand Dollars. Fifteen Thousand Dollars (\$15,000.00)].*

Amendment allowed by the Court, this 7th day of March, 1904.—(Sig.) P. D. Kellett, Jr., Clerk. Amendment allowed by the Court by substituting \$22,000 for \$20,000, this 19th of M'ch, 1904.—(Sig.) P. D. Kellett, Jr., Clerk.

24 Wherefore the plaintiff prays:

1. That the process of this court may issue summoning the said defendant to appear and answer this complaint before a jury of the country at the December 1903 term of this Honorable Court, unless sooner disposed of by judicial authority.

2. That plaintiff may have judgment for the return of all and singular the said property together with damages for its taking and detention and the costs of this action.

WILLIAM W. BIERCE, LIMITED,
By KINNEY & McCLANAHAN,
E. B. M.,
(Sig.) *Its Attorneys.*

Dated, Honolulu, July 20th, 1903.

HONOLULU, OAHU,
Territory of Hawaii, ss:

E. B. McClanahan being first duly sworn on oath deposes and says:

That he is a member of the firm of Kinney & McClanahan, attorneys for William W. Bierce, Ltd., above-named plaintiff—That William W. Bierce Ltd. is a foreign corporation doing business without the Territory of Hawaii, that Kinney & McClanahan are the representatives of William W. Bierce Ltd. in this jurisdiction, that he has read the foregoing complaint and knows the contents thereof and that the matter and things set forth therein are true to the best of his knowledge, information and belief.

(Signed)

E. B. McCLANAHAN.

[* Words and figures enclosed in brackets erased in copy.]

Subscribed and sworn to before me this 20th day of July, A. D. 1903.

(Signed)
[SEAL.]

GUSSIE H. CLARK,
Notary Public, First Judicial Circuit.

EXHIBIT "A."

HONOLULU, H. T., Mar. 13, 1901.

Kona Sugar Company, Limited, Honolulu, H. I.

GENTLEMEN: In pursuance of the verbal agreement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company Limited and William W. Bierce Limited as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company, Limited, Feb. 22, 1900:

We will take in settlement of this contract the sum of \$10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of \$37,044.53, in favor of William W. Bierce, Ltd., payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent ($7\frac{1}{2}\%$) per annum and secured by First Mortgage Bonds of the Kona Sugar Company Limited of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding \$200,000. This offer is conditioned upon its acceptance by you—payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us, before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until

26 the full payment of the note above described, according to its terms.

Very truly yours,

W. W. BIERCE, LTD.,
By H. T. GILBERT.

The above terms are accepted this March 13, 1901.

THE KONA SUGAR CO., LTD.,
J. M.

[SEAL.] By Its President, [F. W.]* McCHESNEY.

By Its Treasurer,
F. W. McCHESNEY.

Amendment allowed by the
Court this 8th day of March,
1904.—(Sig.) P. D. Kellett,
Jr., Clerk.

Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy-six (76) \$500. Bonds of the Kona Sugar Co. Numbered from 1 to 76 both inclusive.

W. W. BIERCE, LTD.,
By H. T. GILBERT.

27

EXHIBIT "B."

\$37,044.53.

HONOLULU, H. I., *March* 13, 1901.

Six months after date we promise to pay to the order of Wm. W. Bierce, Limited, at the Whitney National Bank of New Orleans, La., U. S. A. the sum of Thirty Seven Thousand and Forty-four Dollars and 53/100 (37044.53) with interest at the rate of Seven and one-half per cent. per annum until paid both principal and interest payable in gold coin of the United States.

Secured by Bonds of the Kona Sugar Co. of the nominal value of Thirty Eight Thousand Dollars \$38000—(Seventy Six Bonds of the value of \$500.00 each—numbered from 1 to 76 both numbers inclusive.)

THE KONA SUGAR CO., LTD.,
By Its President, J. M. McCHESNEY.
By Its Treasurer, F. W. McCHESNEY.

(Indorsed.)

Pay to the order of Harry T. Gilbert.

W. W. Bonden,	Wm. W. Bierce, Limited,
Sec't'y & Treas.	By Wm. W. Bierce, Pre'd't.
	Harry T. Gilbert.
Wm. W. Bierce, Ltd.	Wm. W. Bierce, Ltd.,
W. W. Bonden,	By C. Bierce,
Sec't'y & Treas.	V.-Pres't.

(Stamps.)

Indorsement: Law. No. —. Circuit Court 3rd Circuit Territory of Hawaii. Wm. W. Bierce, Ltd., Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Replevin. — — —, Judge. Kinney & McClanahan, Honolulu, Attorneys for Plaintiff. Office No. —. Rec'd \$33.00. J. P. Curtis.

28 In the Circuit Court of the Third Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LTD., a Corporation,

v.

CLINTON J. HUTCHINS, Trustee.

(\$2.00 Stamps.)

Term Summons.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii, or his Deputy, the Sheriff of the Island of Hawaii, or his Deputy:

You are commanded to summon Clinton J. Hutchins, Trustee, Defendant in case he shall file written answer within twenty days after service hereof, to be and appear before the said Circuit Court at the December Term thereof, to be holden at Kailua Island of Hawaii on Wednesday the 23rd day of December next, at 10 o'clock A. M., to show cause why the claim of William W. Bierce Ltd. a corporation Plaintiff should not be awarded to it pursuant to the tenor of its annexed Petition.

And you are commanded to — and have you then there this Writ with full return of your proceedings thereon.

Witness Hon. W. S. Edings, Judge of the Circuit Court of the Third Circuit, at Kailua, Hawaii, this 20th day of July, 1903.

[SEAL.]

(Signed)

HENRY SMITH,

Clerk Judiciary Department.

29 Indorsement: Circuit Court Third Circuit. William W. Bierce Ltd. a corporation v. Clinton J. Hutchins, Trustee. Term Summons. Issued at 3 o'clock P. M. July 20 1903. Henry Smith, Clerk Jud. Dep't. Returned at 7 o'clock A. M. Aug. 1, 1903. J. P. Curts, Clerk. — Service at \$1.00 each \$—. — Cop- at \$1.50 each —. Expense —. Total \$—.

Served the within summons as follows:

On Clinton J. Hutchins, Trustee, at his office in the City of Honolulu, Oahu, Territory of Hawaii, on the 20th day of July, A. D. 1903, by delivering to him a certified copy hereof and of the complaint hereto annexed [together with a certified copy of the affidavit and notice and a copy of the Replevin Bond given herein]* and at the same time showing to him the original summons and complaint, [affidavit, notice and bond.]*

Dated July 20, 1903.

(Signed)

CHAS. F. CHILLINGSWORTH,

Deputy Sheriff.

[* Words enclosed in brackets erased in copy.]

30 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LTD., a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Affidavit.

HONOLULU, OAHU,
Territory of Hawaii, ss:

E. B. McClanahan, being duly sworn, on oath deposes and says: that he is a member of the firm of Kinney & McClanahan the attorneys of William W. Bierce Ltd., a Louisiana corporation plaintiff in the above entitled action: that he is familiar with the facts alleged herein and that he makes this affidavit on behalf of said corporation.

First. That the said William W. Bierce Ltd., is the owner of the following property, to-wit:

362 tons of steel T rails, weighing 35 lbs. to yd.

Joints for laying 550 tons of steel T rails.

Railroad track spikes to lay 550 tons of said rails.

Ten sets of 35 pound split switch material, complete.

16 cars 28 feet along 7 feet wide for 3 ft. gauge track.

One 9 x 14 Class "A" saddle tank locomotive.

One 10 x 16 Class "M" back saddle tank Locomotive.

One Howe narrow gauge track scale, capacity 25 tons.

One set re-railers.

Four track gaugers, 3 ft.

One rail bender.

One track drill.

31 One section car with seats.

Two Jacks.

Second. That the said property is now unlawfully detained by the above-mentioned defendant.

Third. That the said property has not been taken for a tax, assessment or fine pursuant to a statute or seized under an execution or an attachment against the property of the plaintiff.

Fourth. That the actual value of the said property is Fifteen Thousand (15,000) Dollars.

(Signed)

E. B. McCLANAHAN.

Subscribed and sworn to before me this 20th day of July, A. D. 1903.

[SEAL.]

(Signed)

GUSSIE H. CLARK,

Notary Public, First Judicial Circuit.

HONOLULU, H. T., July 20, 1903.

To the High Sheriff of the Territory of Hawaii or the Sheriff of the Island of Hawaii or his deputy:

You are hereby required to take the property from the defendant in the action entitled herein or from his agent or agents. Said property being that fully described herein.

(Signed)

KINNEY & McCLANAHAN,
Attorneys for William W. Bierce, Ltd.,
the Plaintiff Herein.

32 Served the within Affidavit, Notice and Bond on the within named Clinton J. Hutchins, Trustee, defendant, at Honolulu, Oahu, this 21st day of July, A. D. 1903, by delivering to him, copies hereof and at the same time showing him the original Affidavit, Notice and Bond.

Dated July 21st, 1903.

(Signed)

ALBERT MCGURN,
Deputy Sheriff.

33 In pursuance of the within Affidavit and Order, I did on the 22nd day of July, A. D. 1903, attach and take into my custody all the following described property:

362 tons of steel rails, weighing 35 lbs. to yd.
Joints for laying 550 tons of steel rails.
Railroad track spikes to lay 550 tons of said rails.
Ten sets of 35 pound split switch material, complete.
16 cars 28 feet along 7 feet wide for 3 ft. gauge track.
One 9 x 14 Class "A" saddle tank locomotive.
One 10 x 16 Class "A" back bag saddle tank locomotive.
One Howe narrow gauge track scale, capacity 25 tons.
One set re-railers.
Four track gaugers, 3 ft.
One rail bender.
One track drill.
One section car with seats.
Two Jacks.

the same being the property in said Affidavit enumerated.

And did on the 22nd day of July, A. D. 1903, release said property from such attachment upon the filing by defendant of a written undertaking for double the value of the property attached.

(Signed)

J. K. NAHALE,
Deputy Sheriff of North Kona, Hawaii.

Indorsement: — No. — Circuit Court 3rd Circuit Territory of Hawaii. William W. Bierce, Ltd., a corporation, Plaintiff, vs. Clinton J. Hutchins, Trustee Defendant. Affidavit. De Bolt, Judge. Kinney & McClanahan Honolulu Attorneys for W. W. Bierce, Ltd. Filed Aug. 1, 1903 7 o'clock A. M. J. P. Curtis, Clerk.

34 That said witness then testified that he had with him in said record plaintiff's replevin bond and defendant's redelivery bond in said action, and, upon his producing the same, plaintiff offered them in evidence and they were received and read in evidence and marked "Plaintiff's Exhibit B," the said documents respectively being in words and figures as follows:

35 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

(\$1.00 Stamp.)

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Bond.

Know all men by these presents:

That we, William W. Bierce, Limited, a Louisiana corporation having its principal place of business in Chicago, State of Illinois, acting herein by its duly authorized and appointed attorney-in-fact, H. A. Bigelow as Principal and John A. McCandless and William R. Castle as Sureties, both of Honolulu, Territory of Hawaii, and residing in said Honolulu, are held and firmly bound unto Clinton J. Hutchins, Trustee, his successor or successors in trust, heirs and assigns by these presents in the sum of Thirty Thousand (30,000) Dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our successors, executors and administrators, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce Ltd. has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a Replevin suit against the above-mentioned defendant to recover from him certain property more specifically set forth in the Bill of Complaint filed in said suit, which is hereby referred to, and has

36 in writing requested the High Sheriff of the Territory of Hawaii, or his Deputy, or the Sheriff of the Territory of Hawaii, or his Deputy to take the aforementioned property from the said defendant,

Now therefore if the said plaintiff shall well and truly prosecute the said action of Replevin to a successful and final termination, or in case the return of said personal property to the defendant be adjudged and said plaintiff, Principal herein, shall return the same to the said defendant and shall pay to him the said defendant such sum as may from any cause be recovered against the said plaintiff, then this obligation is to be null and void, otherwise to remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 20th day of July, A. D. 1903.

WILLIAM W. BIERCE, LIMITED,
 (Signed) By H. A. BIGELOW,
Its Attorney-in-Fact.
 (Signed) J. A. McCANDLESS.
 (Signed) WILLIAM R. CASTLE.

The foregoing bond is hereby approved as to its sufficiency of sureties.

(Signed) A. M. BROWN,
High Sheriff.

Honolulu July 20th, 1903.

Indorsement: 1370. Law, No. 5782. Circuit Court 3rd Circuit, Territory of Hawaii. William W. Bierce, Limited, a Corporation, Plaintiff vs. Clinton J. Hutchins, Trustee Defendant. Bond. De Bolt Judge. Kinney & McClanahan Honolulu Attorneys for W. W. Bierce, Ltd. Office No. —. Filed Aug. 1st, 1903, 7 o'clock a. m. J. P. Curts, Clerk. Law, 6023. Exhibit B Plaintiff May 7/06. 3 documents. Stipulation Return Bond. Replevin do. Law, No. 6023. Plaintiff's Exhibit B. Filed May 7th, 1908. Job Batchelor, Clerk.

37 Circuit Court, Third Circuit, Territory of Hawaii.

\$1.00 Stamp.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
 v.
 CLINTON J. HUTCHINS, Trustee.

Replevin.

Return Bond.

Know all men by these presents:

That we Clinton J. Hutchins, Trustee, as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns in the sum of thirty thousand (30,000) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, herein and administrators jointly and severally firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the circuit court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken

possession of by the High Sheriff of the Territory of Hawaii, or his deputies and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

38 Now Therefore if the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Signed)

CLINTON J. HUTCHINS, *Trustee.*

(Signed)

HENRY WATERHOUSE, *Surety.*

(Signed)

ARTHUR B. WOOD, *Surety.*

The foregoing Bond is approved as to its sufficiency of sureties.

Dated July 21, 1903.

(Signed)

A. M. BROWN,

High Sheriff.

Indorsement: 1370. L. 5782. Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, a Corporation, Plaintiff, v. Clinton J. Hutchins, Trustee. Return Bond. Filed Aug. 1st, 1903 7 o'clock a. m. J. P. Curts, Clerk. Law 6023. Plaintiff Exhibit B. 1. Stipulation. 2. Return Bond. 3. Replevin Bond. Filed May 7th, '08. 3. Documents. Law No. 6023. Plaintiff's Exhibit "B," Filed May 7th, 1908. Job Batchelor, Clerk.

39 That plaintiff then offered in evidence a stipulation signed by counsel for the parties herein, dated May 2nd, 1908, and the same was received and read in evidence and also marked "Plaintiff's Exhibit B," the same being in words and figures as follows:

40 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Stipulation.

It is hereby stipulated by and between the parties in the above entitled cause that the redelivery bond filed in the action of replevin entitled William W. Bierce, Limited, vs. Clinton J. Hutchins,

Amended May 1st, 1907.—
(Sig.) S. & L. Out.—(Sig.)
S. & L.

Trustee, and dated July 21, 1903, [a copy whereof is attached to the plaintiff's amended complaint in the above entitled cause, and]* the original whereof now remains in the files of said Circuit Court of the First Circuit, was duly executed by the said Clinton J. Hutchins, Trustee, as principal, and the said Henry Waterhouse and Arthur B. Wood, as sureties and delivered to the high sheriff and filed in said action; and that the signatures to said bond are the genuine signatures of the said Clinton J. Hutchins, Trustee, Henry Waterhouse and Arthur B. Wood respectively.

It is also stipulated and agreed that this stipulation may be read on the trial of the above entitled cause as evidence of the facts hereinabove set forth, and that said bond may be so read in evidence without further proof of its execution.

Dated, Honolulu, April 30, 1908.

(Signed)

A. G. M. ROBERTSON,

Attorney for Plaintiff.

(Signed)

CASTLE & WITHINGTON,

Attorneys for Clinton J. Hutchins, Trustee.

(Signed)

SMITH & LEWIS,

Attorneys for the Executors under the Will of

Henry Waterhouse, Deceased, and Arthur B. Wood.

Indorsements: Law 6023. Circuit Court First Circuit. Assumpsit. William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee, et al. Stipulation. Filed May 2d, 1908, at 10:30 o'clock A. M. J. A. Thompson, Clerk. Law 6023. Plaintiff's Exhibit B 1 Stipulation and 2 Return Bond 3 Replevin do May 7th, '08. 3 documents. Law No. 6023 Plaintiff's Exhibit B Filed May 7th 1908 Job Batchelor, Clerk.

42 That said witness also testified that he had with him in said record the defendants' answer to plaintiff's complaint, and, upon his producing the same, plaintiff offered it in evidence and same was received and read in evidence and marked "Plaintiff's Exhibit C," the same being in words and figures as follows:

[* Words enclosed in brackets erased in copy.]

43 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Answer.

Now comes the defendant above named and for his answer to the complaint of plaintiff herein says:

I.

1. Defendant admits that he is a resident and citizen of the Territory of Hawaii, as in said complaint alleged.

2. Defendant admits that under and by virtue of an order of the Honorable W. S. Edings, Judge of the Circuit Court, Third Circuit, Territory of Hawaii, sitting at Chambers in Equity, duly made and entered in that certain action before him pending, entitled, R. W. McChesney, et al., vs. Kona Sugar Company, Limited, et al., all of the property, real, personal and mixed, of the said Kona Sugar Company, Limited, was, on or about the 9th day of May, 1903, sold to this defendant free and clear of all incumbrances.

3. Defendant alleges that the personal property set forth and described in said complaint was on said 9th day of May, 1903, and long prior thereto, the property of said Kona Sugar Company, Limited, and was part of the assets and property so as aforesaid then and

there sold to this defendant; upon the confirmation of said sale on the first day of June, 1903, became ever since has been and now is the owner in lawful possession thereof. [and defendant then became, ever since has been and now is the owner in lawful possession thereof.]*

P. D. K., Jr., 3/10/04.

Amendment allowed by 44
the Court this 10th day of
M'ch, 1904. — (Sig.) P. D.
Kellett, Jr., Clerk.

II.

And, except as hereinbefore admitted, qualified or alleged, defendant denies the truth of the facts stated in said complaint, and in each and every allegation thereof; and denies the truth of each and every fact therein stated.

[* Words enclosed in brackets erased in copy.]

Wherefore defendant asks to be hence dismissed with costs of this action.

Dated August 20th, A. D. 1903.

(Signed)

CLINTON J. HUTCHINS,
Trustee, Defendant.

(Signed)

JNO. W. CATHCART,
Attorney for Defendant.

Indorsement: Circuit Court Third Judicial Circuit Territory of Hawaii. William W. Bierce, Limited, a corporation, Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Answer. Filed Aug. 20, 1903, in Third Circuit Court. Henry Smith, Clerk, Jud. Dept. John W. Cathcart, Attorney for Defendant, Stangenwald Building, Honolulu, T. H.

45 That said witness also testified that he had with him in said record the plaintiff's motion for leave to amend its complaint, with the affidavit of E. B. McClanahan attached, dated March 3rd, 1904, and, upon his producing the same, plaintiff offered it in evidence, and it was received and read in evidence and marked "Plaintiff's Exhibit D," the same being in words and figures as follows:

46 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion to Amend.

Now comes the above named plaintiff, by its attorneys Kinney, McClanahan & Cooper, and moves to amend its complaint heretofore filed herein as follows:

In paragraph 5 on the third page of said complaint *on* the first and second line- of said paragraph, strike out the words "a supplementary contract in writing was," and *in* insert in lieu thereof the words, "said agreement of February 21, 1900, was adjusted and settled by a contract in writing."

In paragraph 6 on the fourth page of said complaint, *on* the second line of said paragraph striking out the word "supplementary" and adding after the word "contract" *on* said line, the words "of March 13th, 1901."

In paragraph 7 on the fifth page of said complaint *on* the first line of said paragraph, strike out the word "supplementary" and add after the word "contract" *on* said line the words "of March 13th, 1901."

In paragraph 14 on the seventh page of said complaint, strike out the words "Fifteen Thousand Dollars" and repeated numerals in brackets, and add in lieu thereof the words "Twenty Thousand Dollars."

This motion is based on the records, and the affidavit of E. B. McClanahan attached to and made a part hereof.

Dated, March 4th, 1904.

(Signed) KINNEY, McCLANAHAN & COOPER,
Attorneys for W. W. Bierce, Ltd.

48 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Affidavit of E. B. McClanahan.

HONOLULU, OAHU,
Territory of Hawaii, ss:

E. B. McClanahan being first duly sworn on oath deposes and says:

That he is one of the attorneys for the above named plaintiff, and as such for said plaintiff swore to the complaint filed herein; that at the time said complaint was drawn affiant had no positive knowledge directly from the plaintiff as to the actual value of the property sued for, but that his knowledge which he had was the best obtainable under the circumstances as they then existed.

That within the past few days, affiant has obtained more satisfactory and detail knowledge of the actual value of said property and for such reason desires on behalf of the said plaintiff to incorporate in said complaint by way of amendment the value now believed by him to be the actual value of said goods, namely, \$20,000.

(Signed)

E. B. McCLANAHAN.

Subscribed and sworn to before me this 3rd day of March 1904.

(Signed)

GUSSIE H. CLARK,

Notary Public, First Judicial Circuit.

Indorsement: Law No. 5782. Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Defendant. Motion to Amend and Affidavit. — — —, Judge. Filed M'ch 4th, 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for — — —.

50 That said witness also testified that he had with him in said record a stipulation for change of venue and the order of the court thereon, dated December 16, 1903, and, upon his producing the same, plaintiff offered same in evidence, and they were received and read in evidence and marked "Plaintiff's Exhibit E," the said documents respectively being in words and figures as follows:

51 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above cause that the venue of the same be changed from the Third Circuit to the First Circuit, and that the trial take place before the Circuit Court of the First Circuit instead of before the Circuit Court of the Third Circuit, and the said parties further agree that the above cause shall not be brought JNO. W. C.
the last week of

up for trial until ^ February 1904.

S. H. D.

Dated, Honolulu, December 14th, 1903.

WILLIAM W. BIERCE,
LIMITED.

(Signed) By Its Attorneys, KINNEY, McCLANAHAN &
COOPER

CLINTON J. HUTCHINS,
Trustee,

(Signed) By His Attorneys, JNO. W. CATHCART.

I allow the foregoing & hereby transfer said cause to the Circuit Court of the First Circuit & direct the Clerk of this Court to forward all papers in said cause to the First Circuit as aforesaid.

(Signed)

W. S. EDINGS,

Judge Circ't Ct, Third Circuit.

Indorsement: Law No. 5782. Circuit Court, First Circuit, Territory of Hawaii. Wm. W. Bierce, Ltd., Plaintiff vs. C. J. Hutchins, Defendant. Stipulation for Change of Venue. W. S. Edings, Judge. Filed December 16, 1903. J. P. Curts, Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for Plaintiff. (Office No. —.)

52 That said witness also testified that he had with him in said record the defendants' bond for costs on motion for a new trial dated and filed March 21, 1904, together with defendants'

motion for a new trial filed March 21, 1904, and, upon his producing the same, plaintiff offered same in evidence, and they were received and read in evidence and marked "Plaintiff's Exhibit F," the said documents respectively being in words and figures as follows:

53 In the Circuit Court of the Third Judicial Circuit (Transferred to First Judicial Circuit), Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion for New Trial.

Comes now Clinton J. Hutchins, Trustee, the defendant above named, by his attorneys Cathcart & Milverton, and moves this Honorable Court that the decision and judgment in the above entitled action rendered and entered on the 12th day of March, A. D. 1904, and the 19th day of March, 1904 respectively, in favor of the above entitled plaintiff and against said defendant, be set aside, and a new trial granted on the following grounds, to wit:

For that the said decision and judgment were and are contrary to the law and the evidence, and the weight of the evidence, and for errors of law occurring during the trial of said action, which errors were duly excepted to by said defendant and such exceptions allowed by the court.

This motion is based upon all the pleadings, papers, files and proceedings in said action, the decision of said court, the record and judgment appertaining to said action, the official stenographer's notes of the evidence and proceedings taken at the trial of the same, and the minutes of the clerk of said Court taken herein.

(Signed) CLINTON J. HUTCHINS, Trustee,
By CATHCART & MILVERTON,
His Attorneys.

Honolulu, T. H. March 19th 1904.

54 To Messrs. Kinney, McClanahan & Cooper, Attorneys for William W. Bierce, Ltd., the above named plaintiff:

Notice.

You and each *each* of you will please take notice that on Wednesday the 23rd day of March, A. D. 1904, at 9 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, we shall present the foregoing motion before the Hon. J. T. De Bolt, First Judge of the Circuit Court, First Circuit.

(Signed) CATHCART & MILVERTON,
Attorneys for Defendant.

Dated Honolulu T. H., March 21st, 1904.

Endorsement: L. No. 5782. 21/300. Circuit Court Third Circuit. (Transferred to 1st Circuit.) William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee. Replevin. Motion for New Trial. Filed March 21, 1904. George Lucas, Clerk. Cathcart & Milverton, Attorneys for Defendant, Honolulu.

55 In the Circuit Court of the Third Judicial Circuit (Transferred to First Judicial Circuit), Territory of Hawaii.

WILLIAM W. BIERCE, LTD., Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

(\$1.00 Stamp.)

Replevin.

Bond.

Know all men by these presents:

That Clinton J. Hutchins, trustee, as principal, and M. F. Scott as surety are held and firmly bound unto Henry Smith, Esq. Clerk of the Judiciary Department of the Territory of Hawaii, and his successors in office in the penal sum of One Thousand Dollars which sum, well and truly to be paid, the said principal and surety do hereby bind themselves, their respective successors, heirs, executors, administrators and assigns.

The conditions of the above obligation are as follows:

That whereas in an action in replevin brought in the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii by William W. Bierce, Ltd., as plaintiff against Clinton J. Hutchins, Trustee, as defendant, on the 20th day of July, A. D. 1903 (which action was subsequently by stipulation of said parties transferred to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii for trial before the Honorable J. T. De Bolt, Judge of said Court, jury waived,) a decision was on the 12th day of March A. D. 1904 rendered by the Judge of said Circuit Court of the First Judicial Circuit in favor of said plaintiff and against said defendant, and thereafter to wit on the 19th day of March, A. D. 1904, Judgment was entered by the Clerk of said Court in accordance with said decision,

And whereas said decision having been duly excepted to by the said defendant at the time of its being rendered and a notice of
56 motion for a new trial having thereupon been duly given and the costs of said action having been paid by said defendant to the Clerk of said Circuit Court of the First Judicial Circuit.

Now therefore, if said motion for a new trial is perfected and all costs of motion in case said defendant fails to sustain the same are paid, and if such defendant shall not to the detriment of the plaintiff in said action remove or otherwise dispose of any property he

may have liable to execution on such judgment, and if all costs are paid by the said defendant on writ of error or exceptions to the Supreme Court of the Territory of Hawaii, if any such writ of error or exceptions are taken, then this obligation shall be null and void, otherwise to remain in full force and effect.

This bond is given under Section 1458 of the Civil Laws of the Territory of Hawaii, and is intended to cover all costs until the final determination of said action.

(Signed) CLINTON J. HUTCHINS, *Trustee*,
 (Signed) By C. J. FALK, *Attorney in Fact*.
 (Signed) M. F. SCOTT, *Surety*.

Dated, Honolulu this 21st day of March, A. D. 1904.

The foregoing bond is hereby approved.

(Signed) J. T. DE BOLT, *Judge*.

Indorsements: 1370. L., 5782. Circuit Court, Third Circuit (Transferred to First Circuit) Territory of Hawaii. William W. Bierce, Limited, Plaintiff vs. Clinton J. Hutchins, Trustee, Defendant. Bond. ———, Judge. Filed March 21, 1904. George Lucas, Clerk. Cathcart & Milverton, Honolulu [Defendant],* Attorneys for Defendant. (Office No. —.) Law, 6023. Bond and Notice of Motion. Plaintiff's Exhibit F. Notice of Motion in record. Law, No. 6023. Plaintiff's Exhibit "F." Filed May 8th, 1908. Job Batchelor, Clerk.

57 That said witness also testified that he had with him in said record the findings of fact dated March 19, 1904, and upon his producing the same, plaintiff offered same in evidence, and same was received and read in evidence and marked "Plaintiff's Exhibit G," the same being in words and figures as follows:

58 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Plaintiff's Request for Findings of Fact and Conclusions of Law.

Findings of Fact.

1.

That William W. Bierce, Limited, plaintiff, and the Kona Sugar Company, Limited, on February 21st, 1900, entered into the con-

[* Words enclosed in brackets erased in copy.]

tract of that date attached to the deposition of Columbus Bierce, read in evidence.

2.

That the personal property sued for in this action was duly shipped to Honolulu, bills of lading having been taken out in the name of the plaintiff, but said property did not pass into the possession of the Kona Sugar Company, Limited, until after the contract of March 13th, 1901, was entered into.

3.

That on March 13th, 1901, plaintiff and the Kona Sugar Company, Limited, entered into the contract of that date attached to plaintiff's complaint as Exhibit "A."

4.

That the payment of \$10,000 under the contract of March 13th, 1901, and the giving of the note for \$37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was intended to be and was in settlement of the contract of February 21st 1900, and said cash and said note and bonds were not given nor were they intended as the consideration for the purchase price of the materials sued for.

5.

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was intended by the parties to be the payment of the note of \$37,044.53 given in settlement of the contract of February 21st 1900.

6.

That the contract of March 13th, 1901, was an entire contract, and intended so to be, for a lump sum consideration which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and non-lienable items thereof.

7.

That by entering into the contract of March 13th, 1901, the contract of February 21st, 1900, was intended to be settled and adjusted.

8.

That both the plaintiff and the Kona Sugar Company, Limited, intended said contract of March 13th, 1901, to operate as a conditional sale of the property sued for and not as a chattel mortgage, or an absolute sale with lien reserved in the vendor.

9.

That in view of all the circumstances of the case said contract of

60 March 13th, 1901, was a conditional sale and not a chattel mortgage, or absolute sale with lien reserved in the vendor.

10.

That some of the property sued for in this action, including railroad rolling stock, was not in fact used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable.

11.

That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action.

12.

That plaintiff did not intend to and did not in fact waive its title by bringing the action to enforce a materialman's lien against the Kona Sugar Company, Limited, and its Receiver.

13.

That the acts of the plaintiff prior to the bringing of this action did not amount to a rescission of the contract of March 13th, 1901, and said contract as a matter of fact has not been rescinded.

14.

That the defendant attempted to purchase and did in fact take possession of the articles sued for, with knowledge both record and actual, of plaintiff's claim and title thereto.

15.

That the actual value of said articles sued for was, at the time of bringing this action and now is, the sum of \$22,000.

61

16.

That plaintiff has suffered damages from defendant's detention of the property in the sum of \$1,045.00 being interest at six per cent. on said sum of \$22,000 from June 1st 1903 to the date of Judgment herein.

17.

That each and every material allegation in plaintiff's J. T. D. complaint, [save as hereinabove qualified,]* has been established by the evidence.

The foregoing Findings of Fact is hereby allowed, this 19th day of March, 1904.

(Signed)

J. T. DE BOLT,
First Judge.

[* Words enclosed in brackets erased in copy.]

Indorsement: Law No. 5782. Circuit Court, Third Circuit. Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Defendant. Plaintiff's Request for Findings of Fact and Conclusions of Law. — — —, Judge. Filed M'ch 15th, 1904, P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for — — —. (Office No. —.)

62 That said witness also testified that he had with him in said record the conclusions of law dated March 19, 1904, and, upon his producing the same, plaintiff offered same in evidence, and same was received and read in evidence and marked "Plaintiff's Exhibit H," the same being in words and figures as follows:

63 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Plaintiff's Requested Conclusions of Law.

1.

That the defendant is not in a position to be able to deny or require proof of plaintiff's corporate existence.

2.

That the contract of February 21st, 1900, was adjusted and settled between the parties by the contract of March 13th, 1901.

3.

That the contract of March 13th, 1901, between plaintiff and the Kona Sugar Company, Limited, was a conditional sale and not a chattel mortgage or absolute sale with lien reserved in the vendor, and under it plaintiff held title to the property sued for.

4.

That the payment of \$10,000 under the contract of March 13th, 1901, and the giving of the note therein for \$37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was in settlement and adjustment of the contract of February 21st, 1900, and neither said cash or said note and bonds were given as a consideration for the purchase price of the materials sued for.

64

5.

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for was the payment

of the note of \$37,044.53 which had been given as one of the considerations for the settlement of the contract of February 21st, 1900.

6.

That the contract of March 13th, 1901 was an entire contract for a lump sum consideration and contained lienable and non-lienable items.

7.

That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action.

8.

That plaintiff is entitled to judgment against the defendant for the return of the property sued for and damages for its detention, and in the event of defendant's inability to return the said property, plaintiff is entitled to judgment for \$22,000 its value, and also damages for its detention.

The foregoing Conclusions of Law is hereby allowed this 19th day of March, 1904.

(Signed)

J. T. DE BOLT,

First Judge.

Indorsement: 21/300 Law No. 5782. Circuit Court, Third Circuit Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Defendant. Plaintiff's Requested Conclusions of Law. ———, Judge. Filed M'ch 15th, 1904, P. D. Kellett, Jr. Clerk. Kinney, McClanahan & Cooper 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

65 That said witness also testified that he had with him in said record the decision of the court in said action dated March 19, 1904, and, upon his producing same, plaintiff offered it in evidence, and same was received and read in evidence and marked "Plaintiff's Exhibit I," the same being in words and figures as follows:

66 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Decision.

The Court having heard the above entitled cause does hereby find for the plaintiff for the recovery of the following property:

362 tons of steel T rails weighing 35 pounds to the yard.
Joints for laying 550 tons of steel T rails.

Railroad track spikes to lay 550 tons of said rails.
 10 set- of 35 pound split switch material, complete.
 16 railway cars 25 feet long, 7 feet wide for 3 ft. gauge track.
 One 9 x 14 Class "A" saddle tank locomotive.
 One 10 x 16 back saddle tank locomotive.
 One Howe Narrow gauge track scale, capacity 25 tons.
 One set re-railers.
 Four track gaugers, 3 feet.
 One rail bender.
 One track drill.
 One section car with seats.
 Two Jacks.

Together with damages for its detention from the 1st day of June 1903 to the date hereof, and in the event of the inability and failure of the defendant to forthwith make return of said property to the plaintiff, that the plaintiff shall have judgment for the value of said property found to be the sum of \$22,000 and
 67 damages for its detention from the 1st day of June 1903, found to be the sum of \$1,045 and the costs of this action.

Dated Honolulu, March 19th, A. D. 1904.

(Signed)

J. T. DE BOLT,
First Judge of the Circuit Court of
First Judicial Circuit.

Indorsement: Law No. 5782. Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Defendant. Decision. ———, Judge. Filed M'ch 19th, 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

68 That said witness also testified that he had with him in said record the judgment in said action dated March 19, 1904, and upon his producing same, plaintiff offered it in evidence, and same was received and read in evidence and marked "Plaintiff's Exhibit J," same being in words and figures as follows:

69 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
 vs.
 CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Judgment.

This cause by stipulation of parties and consent of the above entitled Court coming on regularly to be heard at the January 1904

Term of the Circuit Court of the First Judicial Circuit, before the Honorable John T. De Bolt, on the 7th day of March, A. D. 1904, and by stipulation of parties and consent of Court a jury having been waived and the above named plaintiff being present represented by its attorneys Messrs. Kinney, McClanahan & Cooper, and the above named defendant being present represented by his attorneys John W. Cathcart, Esq., and Messrs. Castle & Withington, and said cause proceeding to trial on said last named day and continuing until Saturday the 12th day of March, 1904, and the Court having heard the evidence adduced by the respective parties and being fully advised in that respect and argument having been made by the respective counsel, and the Court being advised in all ways in the premises and having at the close of said argument rendered a decision in favor of the plaintiff and against the defendant for the return of the property

sued for in said action together with damages for its detention
70 from the 1st day of June 1903 to the date hereof, or in default to make return of said property that said plaintiff recover the value thereof shown to be the sum of \$22,000 together with damages as aforesaid for its detention;

Now therefore, it is ordered and adjudged that the above named defendant Clinton J. Hutchins, Trustee, forthwith return into the possession of William W. Bierce Limited or its authorized agent or attorneys the following described personal property now in the possession of said defendant:

362 tons of steel T rails weighing 35 pounds to the yard
Joints for laying 550 tons of steel T rails
Railroad track spikes to lay 550 tons of said rails
10 set- of 35 pound split switch material, complete
16 railway cars 25 feet long, 7 feet wide for 3 ft. gauge track
One 9 x 14 Class "A" saddle tank locomotive
One 10 x 16 back saddle tank locomotive
One Howe narrow gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers, 3 feet
One rail bender
One track drill
One section car with seats
Two Jacks

and that said William W. Bierce Limited, do have and recover from said Clinton J. Hutchins Trustee, the sum of \$1045.00 as damages for the detention of said property from the 1st day of June 1903, to the date hereof, together with the costs of this action taxed at the sum of \$50.50.

And it is further ordered and adjudged that on failure of the said defendant Clinton J. Hutchins, Trustee, to forthwith make such return of said property to the possession of said plaintiff; that said Plaintiff William W. Bierce Limited have and recover from the said defendant Clinton J. Hutchins, Trustee the value of said property found and adjudged herewith to be the sum of \$22,000 together with damages for its detention from the 1st day of June 1903 to the date

71 hereof found and adjudged to be the sum of \$1,045.00 together with the costs of this action taxed at the sum of \$50.50.

Witness the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit.

Dated, March 19th, 1904.

[By the Court.]*

[Clerk.]*

(Signed)

J. T. DE BOLT,

First Judge.

Indorsement: Law No. 332. Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff vs. Clinton J. Hutchins, Defendant. Judgment. ———, Judge. Filed M'ch 19th, 1904. P. D. Kellet, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

72 That said witness also testified that he had with him in said record the order of court sustaining plaintiff's objection to the sufficiency of the defendants' bond on motion for new trial, dated March 23, 1904, and, upon his producing same, plaintiff offered it in evidence, and same was received and read in evidence and marked "Plaintiff's Exhibit K," same being in words and figures as follows:

73 In the Circuit Court of the Third Judicial Circuit (Transferred to First Circuit), Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Order.

Plaintiff having in open Court at the hearing of defendant's motion for a new trial herein on March 23rd 1904, objected to the sufficiency of defendant's bond on said motion and on appeal and it appearing to the Court that said objection is well taken and should be sustained,

Now therefore it is hereby Ordered that said objection be sustained and that said defendant file a sufficient bond in a sum not less than the amount of the judgment herein on or before March 31st, 1904, in place of said bond before mentioned.

March 23rd, 1904.

(Signed)

J. T. DE BOLT,

*First Judge of the Circuit Court
of the First Circuit.*

Indorsement: Law No. 5782. Circuit Court, First Circuit, Territory of Hawaii. Wm. W. Bierce, Ltd., Plaintiff vs. Clinton J. Hutchins, Trustee, Defendant. Order for New Bond. J. T. De Bolt, Judge. Filed M'ch 23rd 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for Plaintiff. (Office No. —.)

74 That said witness also testified that he had with him in said record plaintiff's notice and motion for an order requiring defendant to file a new redelivery bond, or, in default thereof, that execution issue on the judgment unless the defendant file a bond in double the sum of the judgment, also the affidavits of E. B. McClanahan, John F. Colburn and Percy M. Pond attached to said motion, all of which were filed on March 24, 1904, and upon his producing same, plaintiff offered the documents in evidence, whereupon defendants objected to the introduction of said affidavits and the court sustained the objection, and said notice and motion were received and read in evidence and marked "Plaintiff's Exhibit L," same being in words and figures as follows:

75 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Notice.

To Messrs. Cathcart & Milverton and Messrs. Castle & Withington,
Attorneys for Defendant:

Please take notice that the attached motion will be presented to the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit, on Friday the 25th day of March A. D. 1904, at 9 o'clock A. M. of said day or as soon thereafter as counsel can be heard.

Dated March 22nd, 1904.

(Signed)

KINNEY, McCLANAHAN & COOPER,
E. B. M.,
Attorneys for William W. Bierce, Ltd.

- 76 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion.

Now comes the above named plaintiff, by its attorneys, Kinney, McClanahan & Cooper, and moves this Honorable Court for an order requiring defendant to forthwith file in this cause a new re-delivery bond; or failing in which

That execution issue on the judgment herein, unless defendant file a bond in double the sum of the Judgment herein as provided by Section- 17 and 19 of Act 32 of the Session Laws of 1903;

This motion is based on the record in this cause including defendant's redelivery bond, and on the affidavits of E. B. McClanahan, John F. Colburn and Percy M. Pond, hereto annexed referred to and made a part hereof.

Dated March 22nd, 1904.

WILLIAM W. BIERCE, LIMITED,
By KINNEY, McCLANAHAN & COOPER,
(Signed) E. B. M.,
Its Attorneys.

- 77 That said witness also testified that he had with him in said record an order of court entered in said action dated March 28, 1904, ruling that execution issue unless the defendant file a bond in double the sum of the judgment on or before April 2nd, 1904, and, upon his producing the same, plaintiff offered it in evidence and the same was received and read in evidence and marked "Plaintiff's Exhibit M," same being in words and figures as follows:

- 78 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December Term, 1903.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Order Requiring Defendant to File New Redelivery Bond.

This matter having been brought on by motion of the plaintiff and coming on for hearing on this 28th day of March, A. D. 1904,

and the defendant having filed an affidavit against the allowance of said motion and argument having been made by respective counsel, and the Court being advised in the premises, and having decided that the present re-delivery bond is insufficient;

It is ordered that the above named defendant Clinton J. Hutchins, Trustee, do file in this cause a new re-delivery bond with two sufficient sureties.

P. D. K., Jr. ^ on or before the 2nd day of April, A. D. 1904.

Dated March 28th, A. D. 1904.

(Signed)

J. T. DE BOLT,

*First Judge of the Circuit Court of the
First Judicial Circuit.*

Indorsement: Law. No. 5782. Circuit Court First Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Order Requiring Defendant to File New Delivery Bond. ———, Judge. Filed March 29th, 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

79 That said witness also testified that he had with him in said record an order of court entered in said action dated April 2nd, 1904, extending defendant's time to file such bond until 9 o'clock A. M. April 6th, 1904, and, upon his producing the same, plaintiff offered it in evidence and the same was received and read in evidence and marked "Plaintiff's Exhibit N," same being in words and figures as follows:

80 In the Circuit Court of the Third Judicial Circuit (Transferred to First Judicial Circuit), Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Order Extending Time for Defendant to File New Delivery Bond.

Upon application of Clinton J. Hutchins, Trustee, and on reading — filing his affidavit herein; good cause being thereto shown;

It is ordered that said defendant Clinton J. Hutchins, Trustee, do have further time to wit, up to [and including the]* 9 A. M. the 6th day of April, A. D. 1904, to file in this cause a new re-delivery bond with two sufficient sureties as by this court required on the 28th day of March, A. D. 1904.

Dated, this 2nd day of April, A. D. 1904.

(Signed)

J. T. DE BOLT,

First Judge, First Circuit.

[* Words enclosed in brackets erased in copy.]

Indorsement: Circuit Court, Third Circuit, (Transferred to 1st Circuit) Territory of Hawaii. William W. Bierce, Limited, a Corporation, Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Order. L. 5782. 21/300. Filed April 2, 1904. Henry Smith, Clerk. Cathcart & Milverton, Attorneys for Defendant, Honolulu, T. H.

81 That said witness also testified that he had with him in said record plaintiff's notice and motion dated April 6th, 1904, for the issuance of execution for non-compliance by the defendant with said order of March 28th as modified by said order of April 2nd, also the affidavits of P. D. Kellett, Jr., and E. B. McClanahan attached to said motion, and upon his producing the same, plaintiff offered the documents in evidence whereupon defendants objected to the introduction of said affidavits and the court sustained the objection, and said notice and motion were received and read in evidence and marked "Plaintiff's Exhibit O," same being in words and figures as follows:

82 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Notice.

To Messrs. Cathcart & Milverton, Attorneys for Defendant:

Please take notice that the attached motion will be presented to the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit on Friday the 8th day of April, A. D. 1904, at 9 o'clock A. M. of said day or as soon thereafter as counsel can be heard.

Dated, Honolulu April 6th, 1904.

WILLIAM W. BIERCE, LTD.,
By KINNEY, McCLANAHAN & COOPER,
E. B. M.,
(Sig.) *Its Attorneys.*

83 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion.

Now comes the above named plaintiff, by its attorneys Kinney, McClanahan & Cooper, and moves for the issuance of an execution on the judgment heretofore rendered herein on the grounds set forth in the affidavit of E. B. McClanahan hereto attached and the further ground that the said defendant has failed to comply with the order of this Honorable Court made on the 28th day of March 1904, and modified on the 2nd day of April 1904, such modified order requiring the said defendant to give a new re-delivery bond in a sum of \$30,000 on or before 9 o'clock a. m. of Wednesday April 6th, 1904;

Unless within such time as shall be fixed by this Honorable Court, said defendant deposit herein a bond in double the amount of said judgment with such sureties as shall be approved by this Court conditioned for the prosecution of the exceptions taken herein without delay, and for the performance or payment of the said judgment or such part thereof as may be rendered or affirmed by the Supreme Court on such exceptions.

This motion is based upon Sections 17 and 19 of Act 32
84 of the Session Laws of 1903 as well as the record in this cause including all motions, affidavits and orders, and the affidavit of P. D. Kellett and E. B. McClanahan attached hereto and made a part hereof.

Dated April 6th, 1904.

WILLIAM W. BIERCE, LTD.,
By KINNEY, McCLANAHAN & COOPER,
(Signed) E. B. M.,
Its Attorneys.

85 That said witness also testified that he had with him in said record an order of court entered in said action on April 8th, 1904, ruling that execution issue on the judgment unless defendant file a bond in not less than double the amount of the judgment on or before 9 o'clock A. M., on April 15th, and upon his producing same, plaintiff offered it in evidence and said order was received and read in evidence and marked "Plaintiff's Exhibit P," same being in words and figures as follows:

86 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Order.

The above named plaintiff, by its attorneys, having on the 6th day of April 1904 filed in this Court a motion for the issuance of execution on the judgment heretofore rendered herein, and said motion having been duly presented and argued on this 8th day of April 1904, both parties being represented by counsel, and it appearing to the Court that good cause has been shown for the granting of said motion;

Now therefore, it is ordered that execution issue on said judgment according to the terms thereof, unless the above named defendant Clinton J. Hutchins, Trustee deposit with the Clerk of

this Court on or before the hour of 9 o'clock A. M. [Monday]*
Friday
15th

P. D. K., Jr. April [11th]* 1904, a bond in not less than double the amount of said judgment with sureties to be approved by this Court, conditioned for the prosecution of the exceptions had herein without delay, and for the performance and payment of the judgment or part thereof which may be rendered on said exceptions by the Supreme Court.

87 Dated April 8th, 1904.

(Signed)

J. T. DE BOLT,
*Judge of the Circuit Court of
the First Judicial Circuit.*

Issued Execution on this Order April 15, 1904 at 9.40 a. m.

(Signed) HENRY SMITH,
Clerk Jud. Dept.

Indorsement: Law. No. 5782. Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Order. ———, Judge. Filed April 8th, 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

[* Words enclosed in brackets erased in copy.]

88 That said witness also testified that he had with him in said record the execution issued in said action on April 15th, 1904, and, upon his producing the same, plaintiff offered it in evidence, and same was received and read in evidence and marked "Plaintiff's Exhibit Q," same being in words and figures as follows:

89 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Received May 21, 1904, at 10 a. m. (Sig.) J. K. Nahale, Deputy Sheriff, N. Kona, H.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Execution.

THE TERRITORY OF HAWAII:

To the High Sheriff of the Territory of Hawaii or his Deputy, the Sheriff of the Island of Hawaii or his Deputy:

Whereas, William W. Bierce Limited, did, heretofore, in the Circuit Court of the Third Judicial Circuit bring a certain action of replevin against Clinton J. Hutchins Trustee, to recover the possession of certain railroad material equipment and accessories, (hereafter more particularly described) and did in such action file a replevin bond in the sum of \$30,000; and,

Whereas, after the seizure of said property by virtue of said bond, the defendant Clinton J. Hutchins Trustee, did retake the possession thereof by reason of having given a redelivery bond as required by law; and,

Whereas, said action being at issue, was by agreement of parties and consent of Court transferred for trial to the Circuit Court of the First Judicial Circuit; and,

Whereas, by further agreement of respective counsel, said action came on for trial before the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit, jury waived; and,

90 *Whereas*, a trial having been had, and judgment in said action rendered on the 19th day of March 1904 in favor of plaintiff, William W. Bierce Limited and against the defendant, Clinton J. Hutchins, Trustee, for the return of said property to the possession of William W. Bierce Limited, or its authorized agent or attorney, together with the sum of \$1,045 found as damages for the detention of said property together with the costs of this action taxed at the sum of \$50.50, and in default to make return of said property then and in that event said William W. Bierce Limited to have and recover from said defendant Clinton J. Hutchins, Trustee, the value of said property found and adjudged to be the sum of \$22,000 together with said damages and costs, and,

Whereas, subsequently on the 28th day of March said defendant was ordered to file a new re-delivery bond on or before the 1st day of April A. D. 1904, which time was subsequently extended to the 6th day of April 1904; and,

Whereas, on the 8th day of April 1904, said defendant being in default, in compliance with said order of the 28th day of March, execution was ordered to issue on said judgment unless said defendant on or before the hour of 9 o'clock of Friday the 15th day of April 1904 deposit in Court a bond in not less than double the amount of said judgment with sureties to be approved by the Court conditioned for the prosecution of the exceptions had therein without delay and for the performance and payment of the judgment or part thereof which may be rendered on said exceptions by the Supreme Court; and,

Whereas, said time has elapsed and the defendant has failed to file such bond.

91 Now therefore, you are commanded to forthwith proceed to seize and take possession of the following described property being the property covered by said judgment and situate at Kailua on the Island of Hawaii, Territory of Hawaii.

362 tons of steel T rails weighing 35 pounds to the yard
Joints for laying 550 tons of steel T rails.
Railroad track spikes to lay 550 tons of said rails
10 set- of 35 pound split switch material, complete
16 railway cars 25 feet long 7 feet wide for 3 ft. gauge track
One 9 x 14 Class "A" saddle tank locomotive
One 10 x 16 back saddle tank locomotive
One Howe Narrow gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers, 3 feet
One rail bender
One track drill
One section car with seats
Two Jacks

And having taken such possession to deliver the same to William W. Bierce, Limited, or its authorized agent or attorney.

And you are further commanded that in the event you cannot secure possession of said property, you are to levy upon the personal property of Clinton J. Hutchins, Trustee, defendant in the above entitled action, and if sufficient cannot be found, then upon his real property, and giving 30 days' previous notice as required by law to sell the same or as much thereof as may be found necessary at public sale to the highest bidder in order to satisfy the alternative judgment of \$22,000 had herein.

And you are further commanded in any case to levy upon the personal property of said Clinton J. Hutchins, Trustee, and if sufficient cannot be found then upon his real property, and giving 30 days' previous notice as required by law to sell the same, or so much thereof as may be found necessary at public sale to the highest bidder in order to satisfy said judgment rendered against him in favor of said

92 William W. Bierce Limited on said 19th day of March A. D. 1904, for damages and costs as follows:

Damages	\$1,045
Costs of Court.....	50.50
Judgment entered for.....	1,095.50
Interest on \$23,095.50 from entry of judgment to date...	98.70
	* * *
Costs of execution.....	4.00
	* * *
Total	\$1198.20

And collect also legal interest thereon from date hereof with your costs and expenses and make return of this writ within sixty days, with the proceeds by you collected.

Hereof fail not at your peril.

Witness the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit, this 15th day of April, A. D. 1904.

(Signed)

[SEAL.]

HENRY SMITH,

*Clerk of the Circuit Court of the First Circuit
and of the Judiciary Department of the Ter-
ritory of Hawaii.*

Indorsement: Law No. —. Circuit Court, First Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff vs. Clinton J. Hutchins, Trustee, Defendant. L. 5782. 21/300. Execution. — — —, Judge. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for —. (Office No. —.)

I hereby certify on this 23rd day of May M. H. 1904 at North Kona, Hawaii, I return this Writ of Execution unsatisfied being unable to levy upon the properties therein described. Dated Kailua, May 23rd, 1904. J. K. Nahale, Deputy Sheriff N. Kona, H.

Returned to Office by H. E. Cooper May 27, 1904. J. A. Thompson, Clerk.

Law No. 6023. Plaintiff's Exhibit Q. Filed May 8th 1908. Job Batchelor, Clerk.

93 That said witness also testified that he had with him in said record the minutes of the clerk of the circuit court in the said action of the following dates, viz: March 7, 8, 9, 10, 11, 12, 19, 23, 25 and 28, 1904, and April 8, 1904, and upon his producing the same, plaintiff offered in evidence said minutes of March 7, 1904, and same were received and read in evidence as follows:

94 In the Circuit Court, First Circuit of the Hawaiian Islands,
Jan'y Term, 1904.

Bef. De Bolt, J.

Dated Monday, March 7th, 1904, 9.30 A. M.

WM. W. BIERCE, LTD.,

VS.

CLINTON J. HUTCHINS, Trustee.

Clerk's Minutes.

Replevin.

Transferred from Third Circuit.
Hearing on Motion to Amend Complaint.

Present: Kinney, McClanahan & Cooper for Pl'ff. J. W. Cathcart for Def't. J. L. Horner, Stenographer.

Mr. McClanahan presents the Motion.

Mr. Cathcart argues objecting to the Motion.

The Court grants the Motion and allows the Amendments the same to be made by the Clerk.

Mr. Cathcart notes an exception to the ruling of the Court allowing the Motion also for allowing the amendments to be made interlineations.

Counsel in open Court agrees & stipulate- to waive the trial of this case by a Jury.

The Court thereupon finding that there is nothing for the Jury to do, excuses the Jury until 10 a. m. on Wednesday.

Upon motion of Mr. Cathcart, the Court orders the firm name of Castle & Withington and W. L. Whitney to be entered of record as associate counsel for Def't.

Mr. McClanahan reads the Complaint as amended.

95 Mr. Cathcart states & asks that the Original Answer to stand as the Answer of Def't to the Complaint as Amended; to which counsel for Pl'ff consents, & it is so ordered by the Court.

Mr. Cathcart reads the Answer.

Mr. McClanahan makes an opening statement of his case to the Court after which he offers in evidence.

Articles of Incorporation of William W. Bierce, Limited.

Mr. Cathcart objects to the offer & argues.

Mr. McClanahan argues, after which he withdraws the offer.

Mr. McClanahan reads Stipulation filed Nov. 11th, 1903, that the interrogatories propounded to Columbus Bierce and Harry T. Gilbert in the case of R. W. McChesney, et al. v. Kona Sug. Co. et al. in the Third Circuit Court may be used by the pl'ff in the above cause with the same force & effect as if taken in the above cause.

Mr. McClanahan offers in evidence:

Deposition of Columbus Bierce & then reads the same.

- P.'s Exh. "B." Letter or Bid dated Febr'y 21st 1900 by Wm. W. Bierce Ltd. to Kona Sugar Co.,
 " " "A." Power or Authorization of Frank Davies dated Dec. 23, 1899,
 " " "C." Resolution of the Board of Directors of Wm. W. Bierce Ltd. dated 5th April, 1901,
 " " "D." Contract dated M'ch 13, 1901, between Kona Sugar Co. Ltd. and Wm. W. Bierce, Ltd.,
 " " "E." Promissory Note dated M'ch 13, 1901, for \$37,044.53 by the Kona Sugar Co. Ltd. to Wm. W. Bierce, Ltd.

At 12 M. the Court takes a recess until 2 P. M.

Afternoon Session, 2 p. m.

Before De Bolt, J.

Same Counsel & Stenographer.

Mr. McClanahan, after making a statement with reference to Pl'ff's election, proceeds with the reading of the Deposition of Columbus Bierce.

96 Mr. McClanahan offers in evidence & reads Deposition of Harry T. Gilbert.

P.'s Exh. "F"—Demand dated July 18th, 1903, by Kinney & McClanahan, Att'ys for Wm. W. Bierce, Ltd., to C. J. Hutchins, Trustee.

Mr. McClanahan calls as witnesses, Robert W. Shingle, Sworn;

Mr. McClanahan offers in evidence & reads Deposition of Alexander Lindsay, Jr.,

P.'s Exh. "G"—Protest of Wm. W. Bierce;

J. M. McChesney, Sworn.

Mr. McClanahan tenders in open Court Bonds Nos. 1-76 inclusive of the Kona Sugar — Ltd. for \$500 each, and the Note of the Kona Sugar Co. Ltd. for \$37044.53 dated Mch. 13, 1901.

Mr. Cathcart objects to the tender & argues.

Mr. McClanahan argues.

The Court overrules the objection & Mr. Cathcart excepts.

George Lucas, Sworn;

Mr. McClanahan offers in evidence papers in the case of In Re McChesney & Sons v. The Kona Sugar Co. Ltd. et al. instituted in the 3rd Circuit Court Eq. 1347 reading the particular paper he desires to offer.

F. L. Dortch, sworn; Henry Smith, Sworn;

Mr. McClanahan offers in evidence

P.'s Exh. "H"—Act 36 of Acts & Resolution passed by The General Assembly of the State of Louisiana at the Regular Session, begun & held at the City of Baton Rouge on the 14th day of May, 1888, & which adjourned on Thursday the 12th day of July, A. D. 1888.

Mr. Cathcart objects to the offer & argues.

Mr. McClanahan argues.

97 The Court admits the Act in evidence & — is marked Pl'ff's Exh. "H."

Mr. Cathcart notes an exception.

William W. Bierce, Sworn.

At 4 P. M. the Court continues the hearing until 10 a. m. tomorrow & then adjourns for the day until 9 a. m. tomorrow.
(Signed) P. D. KELLETT, JR., Clerk.

98 That plaintiff also offered in evidence said minutes of March 8, 1904, and same were received and read in evidence as follows:

99 TUESDAY, *March 8th*, 1904—10:45 a. m.
Before De Bolt, J.

Continued from the 7th inst.

Present:

Kinney, McClanahan & Cooper and S. H. Derby for Pl'ff.

J. W. Cathcart and W. L. Whitney for Def't.

J. L. Horner, Stenographer.

Mr. McClanahan resumes with the Direct-examination of William W. Bierce.

Mr. McClanahan files for Identification: Exh. "AA" Copy Articles of Incorporation of William W. Bierce, Ltd., dated Dec. 2, 1899.

At 12 M. the Court takes a recess until 2 P. M.

In the Circuit Court, First Circuit of the Hawaiian Islands, January Term, 1904.

Bef. De Bolt, J.

Dated Tuesday, March 8th, 1904.

L. 5782.

WILLIAM W. BIERCE, LTD.,

vs.

CLINTON J. HUTCHINS, Trustee.

Continued.

Clerk's Minutes.

Afternoon Session, 2 p. m.

Before De Bolt, J.

Same Counsel & Stenographer are present.

Mr. Cathcart resumes with the Cross-examination of William W. Bierce.

M. F. Scott, Sworn.

100 Mr. McClanahan asks leave of the Court as well as Counsel for Def't that the papers in the case of McChesney & Sons v. Kona Sug. Co., that were admitted in evidence in this case, be taken as read: No objections, it is so considered.

Mr. McClanahan asks leave to amend the complaint so as to conform to the proof, to wit: in Exhibit A, attached to the complaint, second page by substituting "J. M. McChesney" for "F. W. McChesney" and by adding thereto the words "By its Treasurer F. W. McChesney."

No objections, the Court allows the Amendment.

E. B. McClanahan, sworn.

Mr. McClanahan offers in evidence:

P.'s Exh. I—Minutes produced from the custody of the Def't of Kona Sugar Co., Directors' Meeting of March 16th, 1901, on p. 45.

Pl'ff rests.

Mr. Cathcart moves to strike out certain portions of Columbus Bierce's Deposition reading same & taken down by the Stenographer & argues.

Mr. McClanahan argues.

The Court denies the Motion.

Mr. Cathcart notes an exception.

Mr. Cathcart further moves to strike out Interrogatory 41 & Answer thereto of C. Bierce.

Same ruling & exception.

Mr. Cathcart makes an opening statement of his case to the Court after which he offers in evidence:

D.'s Exh. 1—Certified Copy of the Order & Motion made by the Pl'ff in this case preliminary to the bringing of the action to enforce Materialman's Lien.

101 D.'s Exh. "2"—Certified Copy of the Complaint on the Mechanic's Lien filed August 1st, 1902.

D.'s Exh. "3"—Certified copy of Petition of Wm. W. Bierce, Ltd., in Intervention.

At 3:55 P. M. the Court continues the hearing until 9:30 a. m. tomorrow & then adjourns until 9 a. m. tomorrow.

(Signed)

P. D. KELLETT, JR., Clerk.

102 That plaintiff also offered in evidence said minutes of March 12, 1904, and same were received and read in evidence as follows:

103 SATURDAY, *M'ch* 12th, 1904—10 a. m.

Before De Bolt, J.

Continued from the 11th inst.
Same counsel are present.

Mr. Cathcart replies.

Mr. McClanahan replies.

The Court renders an oral decision finding for the Pl'ff to recover the property as set out in the complaint and [damages in the sum of (\$23,000)]* failing the recovery fixes the value of said property at \$22000.—on the 1st of June, 1903, and damages interest on said value at the rate of 6% from said June 1st 1903 and costs.

Mr. Cathcart excepts to the Judgment of the Court as being contrary to the law & evidence & the weight of evidence and gives notice of Motion for New Trial.

At 11:23 a. m. the Court adjourns until 9 a. m. on Monday.

(Signed)

P. D. KELLETT, JR., *Clerk.*

104 That plaintiff also offered in evidence said minutes of March 19, 1904, and same were received and read in evidence as follows:

105 In the Circuit Court, First Circuit, of the Hawaiian Islands, Jan'y Term, 1904.

Bef. De Bolt, J.

Dated Saturday, March 19th, 1904, 9 a. m.

L. 5782.

21/300.

WM. W. BIERCE, LTD.,

VS.

CLINTON J. HUTCHINS, Trustee.

Clerk's Minutes.

Hearing on Pl'ff's Bill of Costs, Findings and Fact, and Conclusions of Law.

Present: Kinney, McClanahan & Cooper for Pl'ff. Cathcart & Milverton for Def't. J. L. Horner, Stenographer.

Mr. McClanahan asks the Court to take up the Findings of Facts first after which he reads the Pl'ff's Findings of Facts also the Pl'ff's Conclusions of Law.

Mr. Milverton reads Def't's Objections to Pl'ff's proposed Findings of Facts taking *it* one at a time.

The Court overrules objections 1 & 2 to which ruling Mr. Milverton notes an exception.

The Court, after hearing arguments as to objection #3, overrules the objection & exception noted by Mr. Milverton.

[* Words and figures enclosed in brackets erased in copy.]

To objection # 4, same ruling & exception

" " # 5, " " "

" " # 6, " " "

" " # 7, " " "

" " # 8, " " "

" " # 9, " " "

" " # 10, " " "

" " # 11, " " "

" " # 12, " " "

" " # 13, after argument of Counsel, Mr. McClanahan asks leave to amend the Complaint by substituting \$22000 in place of \$20,000 wherever it appears: the Court allows the Amendment & directs the Clerk amend the Complaint.

Mr. Milverton notes an exception.

106 The Court overrules objection #13 & exception noted by Mr. Milverton.

To objection #14 same ruling & exception.

" " #15 Mr. McClanahan asks leave to strike out the following words in the Pl'ff's Findings of Facts, to wit: "save as hereinabove qualified."

The Court grants the Motion.

Mr. Milverton notes an exception.

The Court overrules the Def't's Objection #15, to which Mr. Milverton notes an exception.

Mr. Milverton reads Def't's Objections to Pl'ff's proposed Conclusions of Law taking *it* one at a time.

Objection #1 overruled by the Court & Exception.

" #2 " " "

" #3 " " "

" #4 " " "

" #5 " " "

" #6 " " "

" #7 " " "

" #8 " " "

Mr. McClanahan thereupon asks the Court to allow the Conclusions of Law and the Findings of Fact as presented by endorsement thereon, which is so allowed by the Court.

Mr. Milverton notes an exception.

Mr. McClanahan then presents to the Court the Decision for signature.

Mr. Milverton objects & argues.

The Court overrules the objection & then signs the Decision & filed.

Mr. Milverton notes an exception.

107 Mr. McClanahan reads Pl'ff's Bill of Costs, and Affid't of Wm. W. Bierce.

Mr. Milverton reads Def't's Objections to Pl'ff's Bill of Costs & Affid'ts of Wm. E. Rowell & of C. H. Klugel.

Mr. Milverton takes up the 1st objection argument on Motion to set \$3.00.

The Court after hearing arguments of Counsel, disallows s'd item of \$3.00.

Mr. McClanahan notes an exception.

Second objection, attendance at taking of Deposition of Alex. Lindsey, Jr., \$3.00.

The Court after hearing arguments by Counsel, disallows s'd item of \$3.00.

Mr. McClanahan notes an exception.

Third objection, expense of replevin bond \$300.

The Ct. after hearing arguments by counsel, disallows s'd item of \$300.

Mr. McClanahan notes an exception.

Fourth objection, W. W. Bierce expert testimony; Railway fare W. W. Bierce Chicago to S. F. & return \$110; Sleeper Chicago to S. F. \$15.00; Meals on Sleeper \$10; Steamer fare S. F. to Honolulu & return \$135.00. Transportation & expenses Honolulu to Kailua \$48, making a total of \$318.

The Court after hearing arguments by respective counsel disallows s'd items am't'g to \$318.

Mr. McClanahan notes an exception.

The Court then allows & taxes the Pl'ff's Bill of Costs at \$50.50.

Mr. McClanahan presents to the Court, the Judgment for entry & signature.

Mr. Milverton objects to the entering of the Judgment on the grounds taken down by the Stenographer.

108 The Court overrules the objections.

Mr. Milverton notes an exception.

The Court signs the Judgment.

Mr. Milverton excepts to the Judgment as being contrary to law & the evidence & against the weight of evidence.

Mr. Cathcart gives notice of motion for New Trial.

At 11:15 a. m. the Court adjourns until 9 a. m. on Monday.

(Signed)

P. D. KELLETT, JR., *Clerk.*

109 That plaintiff also offered in evidence said minutes of April 8, 1904, and same were received and read in evidence as follows:

110

FRIDAY, April 8th, 1904, A. M.

Before De Bolt, J.

Hearing on Motion for Execution to Issue.

Present: Kinney, McClanahan & Cooper and S. H. Derby for Pl'ff. Cathcart & Milverton for Def't. J. L. Horner, Stenographer.

Mr. McClanahan presents the Motion.

Mr. Milverton objects to the Motion being taken up at this time reading Rule VI of the First Circuit Court & asks that the Motion should go over until Monday morning.

Mr. McClanahan argues.

Mr. Cathcart argues.

Mr. McClanahan replies.

The Court holds that the consideration of the Motion is proper at this time & therefore overrules the objection.

Mr. Cathcart notes an exception.

Mr. McClanahan reads the Motion & Affidavits of P. D. Kellett, Jr. & of E. B. McClanahan.

Mr. Cathcart reads Counter-Affid'ts of C. J. Hutchins & of Guy F. Maydwell.

Mr. McClanahan argues.

Mr. Cathcart argues.

Mr. McClanahan replies.

Mr. Cathcart replies.

The Court grants the Motion & orders that execution issue on s-d judgment unless the Def't herein deposit with the Clerk of this Court on or before the hour of 9 o'clock a. m. of Friday, April 15th

111 1904, a bond in not less than double the amount of said judgment with sureties to be approved by this Court conditioned for the prosecution of the exceptions had herein without delay, & for the performance & payment of the Judgment or part thereof which may be rendered on s-d exceptions by the Supreme Court.

Mr. Cathcart notes an exception.

Mr. Cathcart orally moves the Court for further time to & including April 16th, 1904, within which to prepare, present for allowance & file Bill of Exceptions.

Mr. McClanahan objects to the Motion.

The Court grants the Motion & then signs an order allowing Def't till Ap-l 16, 1904, within which to file Bill of Exceptions.

(Signed)

P. D. KELLETT, JR., *Clerk.*

112 That said witness also testified that he had with him the documents and record of the Supreme Court of the Territory of Hawaii in said action of replevin, same being Number 265 of the records of said Supreme Court, and that he had in said record the judgment entered by said court in said action on May 6, 1905, and, upon his producing the same, plaintiff offered it in evidence and same was received and read in evidence and marked "Plaintiff's Exhibit W," same being in words and figures as follows:

113 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Judgment.

Now on this 6th day of May, 1905, the same being one of the regular court days of the October 1904 Term of said Court, the above cause coming on for further consideration on the plaintiff's motion for a modification of the original decision herein made and filed on January 28, 1905, so as to direct that the above cause be remanded to the Circuit Court of the First Circuit with directions to enter judgment for the defendant with costs, and said motion having been granted, and said order having been entered on this date.

Now therefore it is considered by the Court and is now ordered and adjudged that the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in favor of the plaintiff for the return of the property in controversy in the above cause, or in case the same should not be returned, for the value thereof, found to be the sum of \$22,000.00 and interest thereon, be and the same is hereby reversed, and the exceptions, in so far as they raise the question of election, are sustained, and the said cause is hereby remanded to the said Circuit Court with directions to enter judgment for the defendant with costs.

By the Court:

Entered this 6th day of May, A. D. 1905.

(Signed)

GEORGE LUCAS,

Clerk of the Supreme Court of the Territory of Hawaii.

Indorsement: No. —. Supreme Court Territory of Hawaii. Wm. W. Bierce, Ltd. vs. Clinton J. Hutchins. Judgment. Filed May 6th, 1905, at — M. George Lucas, Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for — —.

114 That said witness also testified that he had with him in said record of said Supreme Court the order of the Supreme Court of the United States allowing plaintiff's appeal, plaintiff's appeal bond, order of supersedeas, dated March 5, 1906, motion for writ of supersedeas, and the assignment of errors, and, upon his producing the same, said documents were offered in evidence by the plaintiff and were received and read in evidence and marked "Plaintiff's Exhibit X," said documents respectively being in words and figures as follows:

115

Supreme Court of the United States.

No. 14, Original, October Term, 1905.

Ex Parte in the Matter of WILLIAM W. BIERCE, LIMITED, Petitioner.

On consideration of the Motion for leave to file the Petition for Writs of Mandamus or Certiorari herein,

It is now here ordered by the Court that said motion be, and the same is hereby, granted, and on consideration of the petition and of the record presented therewith it is ordered that an appeal from the judgment of the Supreme Court of the Territory of Hawaii in the case of William W. Bierce, Limited, a corporation, vs. Clinton J. Hutchins, Trustee, be, and the same is hereby, allowed on the appellant giving bond in the penal sum of \$1,000, conditioned according to law, and approved by the Chief Justice of said Supreme Court or an Associate Justice thereof.

DECEMBER 4, 1905.

A true copy.

Test:

[SEAL.]

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Indorsement: Supreme Court of the United States, October Term, 1905. Term No. 14, Original. Order Allowing Appeal Filed Dec. 4th, 1905. Filed January 13, 1906. George Lucas, Clerk.

116

(\$1.00 Stamp.)

Know all men by these presents, That we, William W. Bierce, Limited, a corporation, as principal, and Pacific Surety Company, of California, as sureties, are held and firmly bound unto Clinton J. Hutchins, Trustee, in the full and just sum of One thousand dollars, to be paid to the said Clinton J. Hutchins, Trustee, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this thirteenth day of January, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Supreme Court of the Territory of Hawaii in a suit depending in said Court, between William W. Bierce, Limited, a corporation, plaintiff, and Clinton J. Hutchins, Trustee, defendant, a judgment was rendered against the said plaintiff and the said plaintiff having obtained an appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said Clinton J. Hutchins, Trustee, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date thereof.

Now, the condition of the above obligation is such, That if the said William W. Bierce, Limited, a corporation shall prosecute said

appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM W. BIERCE, LIMITED,
(Signed) By COLUMBUS BIERCE,
Vice-President. [SEAL.]

Attest:
(Signed) E. W. HOLDEN,
Sec'y & Treas. [SEAL.]
(Signed) PACIFIC SURETY COMPANY,
(Signed) By H. B. MARINER,
Attorney in Fact. [SEAL.]

Sealed and delivered in presence of—

(Signed) A. K. Y. YAP.
(Signed) A. G. M. ROBERTSON.

117 Approved by:
(Signed) W. F. FREAR,
*Chief Justice of the Supreme Court of the
Territory of Hawaii.*

Indorsement: Supreme Court, Territory of Hawaii. William W. Bierce, L't'd, vs. Clinton J. Hutchins. Bond. Filed January 13, 1906. George Lucas, Clerk.

118 Supreme Court of the United States.

No. 607, October Term, 1905.

WILLIAM W. BIERCE, LIMITED, Appellant,
vs.
CLINTON J. HUTCHINS, Trustee.

On consideration of the Motion for a Supersedeas in this cause,
It is now here ordered by the Court that the bond heretofore given
herein operate as a supersedeas and that the judgment be superseded
accordingly.

MARCH 5, 1906.

A true copy.

Test:
[SEAL.] (Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Indorsement: File No. 20,109. Supreme Court of the United States, October Term, 1905. Term No. 607. Order. Filed Mar. 5, 1906. Filed March 23, 1906. George Lucas, Clerk.

119 Office Supreme Court U. S. Filed Feb. 28, 1906. James
H. McKenney, Clerk.

Supreme Court of the United States.

October Term, A. D. 1905.

No. 607.

WILLIAM W. BIERCE, LIMITED, Appellant,

vs.

CLINTON J. HUTCHINS, Appellee.

Motion for Writ of Supersedeas.

Now comes the appellant, by Charles H. Aldrich, its solicitor, and moves the court that a writ of supersedeas issue herein, and that the bond heretofore given in said cause and shown at pages 350-351 of the printed record stand as the bond upon said supersedeas; and in support of said motion the appellant suggests:

First. That the appellee or those in privity with him have the possession of the property in controversy, and such supersedeas will in nowise affect the possession or control of said property.

Second. That such supersedeas is necessary to preserve the rights of the appellant against the sureties upon the bond given to the sheriff upon the seizure of the property.

And in support of such motion the appellant files herewith and makes a part hereof the affidavit of William W. Bierce, bearing date the twenty-fourth day of February, A. D. 1906.

CHARLES H. ALDRICH,

Solicitor for Appellant.

120 In the Supreme Court of the United States, October Term,
A. D. 1905.

WILLIAM W. BIERCE, LIMITED, Appellant,

vs.

CLINTON J. HUTCHINS, Trustee, Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

UNITED STATES OF AMERICA,

District of ———, ss:

William W. Bierce, being first duly sworn, says that he now resides in the city, county, and Territory of Oklahoma, and until on or about the 1st day of May, A. D. 1905, was the president of William W. Bierce, Limited, a corporation created and existing by virtue of the laws of the State of Louisiana, which is the appellant in the above entitled cause; that as such president he has heretofore had

active personal charge of the business and transactions involved in said suit and out of which said cause arose, as well as of the prosecution of said cause in both the courts below; that he, this affiant, still has a substantial pecuniary interest in said corporation, its property and rights, and makes this affidavit in its behalf and in support of the application it is about to make as the appellant in said cause for an order of court awarding a writ of supersedeas in said cause commanding the justices of the supreme court of the Territory of Hawaii to stay all proceedings on the judgment of the said supreme court of the Territory of Hawaii in said cause pending said appeal.

Affiant further says that for convenience he hereinafter mentions the parties to said cause by the titles and according to the positions they occupied in the court below, said appellant, William W. Bierce,

Limited, as plaintiff and said appellee, Clinton J. Hutchins, 121 trustee, as defendant.

Affiant further says that the necessity for the issuance of such writ of supersedeas in said causes arises in the following manner—that is to say, that, as shown by the sheriff's return to process of replevin issued in said cause at the time of the beginning thereof, on or about the 20th day of July, A. D. 1903, which return bears date the 22d day of July, A. D. 1903, the property levied upon by said sheriff by virtue of said process and in controversy in said cause, consisting of three hundred and sixty-two tons of steel railroad rails, two railroad locomotives, sixteen cane cars, and other plantation railroad equipment and material, was released to said defendant by said sheriff from the levy of said process and returned to said defendant upon the filing by him of a written undertaking for double the supposed value of the property so levied upon, which said process and return are shown upon pages 61 to 65, both inclusive, of the original transcript of the record in said cause filed in this court and upon pages 45 to 47, both inclusive, of the printed transcript of said record filed in this court.

That said undertaking mentioned in said sheriff's return is a so-called return or redelivery bond in the sum of thirty thousand dollars (\$30,000.00) bearing date the 21st day of July A. D. 1903, made by said defendant, Clinton J. Hutchins, Trustee, as principal, and by Henry Waterhouse and Arthur B. Wood as sureties, and is conditioned for the delivery of all said property in controversy in said cause to said plaintiff, if such delivery be adjudged, and for the payment to said plaintiff of such sum as may for any cause be recovered against said defendant, and was filed in the circuit court in which said suit was begun on or about the 1st day of August, A. D. 1903, and still remains in the custody of said circuit court, and is shown on pages 66 and 67 of said original transcript and on 122 pages 48 and 49 of said printed transcript.

That in the month of January and February A. D. 1904, affiant made a trip from his place of residence, in Oklahoma City aforesaid, to the city of Honolulu, in the island of Oahu, in said Territory, where he arrived on or about the 8th day of February A. D. 1904, for the purpose, among others, of attending the trial of said cause as a witness on the part of said plaintiff, and on said trip

remained in the city of Honolulu aforesaid about two months, or until on or about the 1st day of April, A. D. 1904; that while on said trip affiant was present at the trial of said cause in the circuit court of the first judicial circuit of said Territory, sitting at the city of Honolulu aforesaid, from about the 7th until the 12th day of March, A. D. 1904, and testified on said trial as a witness on the part of said plaintiff, and remained in the city of Honolulu aforesaid until some time after the entry of final judgment in said cause by said circuit court, on the 19th day of March, A. D. 1904, in favor of said plaintiff and against said defendant, as shown upon pages 425 to 428, both inclusive, of said original transcript and upon pages 273 to 275, both inclusive, of said printed transcript.

That in the month of May, A. D. 1904, after affiant's return from the City of Honolulu aforesaid to his place of residence, in Oklahoma City aforesaid, he was advised by letters received from counsel for said plaintiff residing in said city of Honolulu that said defendant had taken said cause up to the supreme court of said Territory for review by bill of exceptions in the nature of an appeal, for which purpose said defendant had executed and filed in said circuit court a certain bond upon exceptions running to the clerk of the judiciary department of said Territory, in the sum of one thousand dollars (\$1,000.00) conditioned for the payment of court costs upon such

123 exceptions in said cause in said supreme court, and further conditioned that the said defendant should not to the detriment of said plaintiff remove or otherwise dispose of any property he might have liable to execution on said judgment pending such exceptions, which said bond had been approved by said circuit court, and by virtue of the laws of said Territory operated as an arrest of judgment and stay of execution on said judgment, provided, however, that said circuit court might, upon good cause shown, allow execution to issue or other appropriate action to be taken for the enforcement of said judgment, and, further, the said counsel in behalf of said plaintiff had made application to said circuit court and therein shown such cause, and thereby caused execution to issue on said judgment in said cause, and that said sheriff had attempted to levy said execution upon the property in controversy in said cause, but had been unable to take the same in execution thereunder, because said defendant had disposed of said property to third persons into whose possession the same had passed, and was also unable under said execution to make the moneys, or any part thereof, recovered by said plaintiff from said defendant by said judgment whereon said execution had been issued; wherefore said sheriff had returned said execution into said circuit court wholly unsatisfied.

That in the month of June, A. D. 1904, affiant was advised by letters received from counsel for said plaintiff residing in Honolulu that shortly prior to the 4th day of April, A. D. 1904, said Henry Waterhouse, one of the sureties on said return or redelivery bond, had departed this life at the city of Honolulu aforesaid, leaving an estate in said Territory of the estimated value of two hundred and forty thousand dollars (\$240,000.00) in excess of all debts and liabilities of said Waterhouse, and leaving a last will and testament,

wherein he had nominated and appointed William Waterhouse and Albert Waterhouse executors thereof; that said will had been
124 admitted to probate and letters testamentary issued thereon to said executors by the court of said Territory having jurisdiction in that behalf, and that in pursuance of the statutes of said Territory, said executors had, on the 4th day of April, A. D. 1904, published notice in a newspaper published in the city of Honolulu aforesaid to all creditors of said Henry Waterhouse, deceased, to present their claims, duly authenticated and with proper vouchers, to said executors within six months from the date of such publication; that according to the provisions of the statutes of said Territory in that behalf, any claim against the estate of said Henry Waterhouse, deceased, must be presented to said executors within six months after the 4th day of April, A. D. 1904, and prior to the 4th day of October, A. D. 1904, or be forever barred by the statutes of said Territory, with an exception as to a claim not due, which must be so presented within six months after it fell due, or be forever barred by said statutes; that, in accordance with further provisions of said statutes, in the event of the rejection by said executors of a claim so presented, a suit must be brought thereon in the proper court of said Territory against said executors within two months after such rejection, or within two months after such claim should become due, or else it would be forever barred by said statutes; that thereupon affiant consulted other counsel for said plaintiff concerning the matter of the presentation to said executors of a claim by said plaintiff upon said return or redelivery bond, and the advisability of bringing suit against said executors thereon in the event of their rejection of such claim, and in the month of July, A. D. 1904, was advised by such other counsel that by reason of said plaintiff's exercise of its right under the statutes of said Territory to have
125 execution issue on said judgment, and of the failure of said defendant to deliver the specific property in controversy in said cause to the plaintiff and of his failure to pay to the plaintiff the moneys recovered against him by said judgment, the conditions of said return or redelivery bond had been broken and a cause of action thereon had accrued to said plaintiff against the principal and surviving surety thereon, as well as against said executors of Henry Waterhouse, the deceased surety thereon, and that unless said plaintiff should present its claim for damages on said bond for such breach or breaches thereof the said executors within six months from the 4th day of April, A. D. 1904, and, in the event of the rejection of such claim by said executors, bring suit thereon against them within two months after such rejection, such claim and cause of action would be forever barred by the statute of limitations of said Territory as against said executors and the estate of said Henry Waterhouse, deceased; that thereafter, and on or about the 1st day of August, A. D. 1904 affiant, as the president of said plaintiff corporation, by letter mailed to said counsel for said plaintiff residing in the city of Honolulu aforesaid, requested and instructed said counsel at once to present to the said executors said plaintiff's claim on said bond, and in the event of the rejection thereof by said execu-

tors immediately to bring suit thereon in the name and behalf of said William W. Bierce, Limited, against said executors and the surviving obligors on said bond, and that some time thereafter affiant was duly advised by letters received from said counsel that they had presented such claim in due form to said executors on the 30th day of September, A. D. 1904, that said executors had rejected the same, and that they, said counsel, thereupon, and on or about the 11th day of October, A. D. 1904, and within the time limited for that purpose by said statutes of said Territory, had begun an action of assumpsit on said bond in the circuit court of the first judicial circuit of said Territory in the name and in behalf of said William W. Bierce, Limited, against said Clinton J. Hutchins, trustee; Arthur B. Wood and William Waterhouse and Albert Waterhouse, as executors of the last will and testament of said Henry Waterhouse, deceased, for the recovery of the plaintiff's damages for breach of the conditions of said bond or for the value of said property assessed at the sum of twenty-two thousand dollars (\$22,000.00) and recovered against said defendant, Clinton J. Hutchins, trustee, in and by said judgment with interest thereon from the 19th day of March, A. D. 1904, and that thereafter such proceedings were duly taken and had in said action on said bond that by the service of process and by the voluntary entry of their appearance therein jurisdiction was duly acquired of the persons of the defendants therein by said circuit court, and that all of said defendants duly appeared in said action on said bond in said circuit court and filed therein their formal answers to the plaintiff's complaint therein, traversing the averments thereof and denying their liability in said action.

That since the property in controversy in the above-entitled cause was released to said defendant by said sheriff from the levy of said process of replevin and returned to said defendant, on or about the 22d day of July, A. D. 1903, as aforesaid, none of said property has been returned or delivered to said plaintiff or to any one representing it, nor has the value of said property assessed and recovered by said judgment to the amount of twenty-two thousand dollars (\$22,000.00), or any part thereof, ever been paid to said plaintiff or to any one representing it.

That during affiant's said trip to the city of Honolulu aforesaid he met and became personally acquainted with said defendant, Clinton J. Hutchins, trustee, and became personally familiar with his financial standing and condition, and that on numerous occasions since said trip affiant has been advised by letters received from counsel for said plaintiff residing at the city of Honolulu aforesaid respecting the financial standing and condition of said defendant Hutchins, as well as respecting the property and financial condition of said surviving surety, Arthur B. Wood, and that affiant is thereby informed and believes that said defendant, Clinton J. Hutchins, trustee, is a person of little or no financial responsibility and of doubtful solvency, and has no property situated within the Territory of Hawaii or elsewhere out of which said judgment for the value of said property, or any considerable portion

thereof, could be collected by execution or otherwise, and that said surviving surety, Arthur B. Wood, is likewise a person of little or no financial responsibility and of doubtful solvency, and has no property situated within the Territory of Hawaii or elsewhere out of which said judgment for the value of said property, or any considerable portion thereof, could be collected by execution or otherwise, and that said Wood, prior to the month of April, A. D. 1904, permanently removed from said Territory of Hawaii, and also removed therefrom and otherwise disposed of all of his property previously situated within said Territory, and took up a new residence in some place without said Territory, but that affiant by making diligent search and inquiry for that purpose has been unable to learn the present place of residence of said Wood or what property, if any, he owns without said Territory, and that the only effectual recourse said plaintiff now has for the recovery of the value of said property is against said executors and estate of said Henry Waterhouse, deceased, in said action on said return or redelivery bond, which said action is still pending and undetermined in said Circuit Court.

Affiant further says that he has been lately advised by counsel for said plaintiff residing at Honolulu that when said action
128 on said bond was reached on the call of the trial calendar of said circuit court, at the beginning of the last January term thereof, the defendants in said action, by their counsel, opposed said plaintiff's application for a continuance thereof, but that said circuit court nevertheless ordered said cause to be continued until the next April term thereof, beginning on the 2d day of April, A. D. 1906, but has since allowed said defendants an interlocutory bill of exceptions from such order of continuance to the supreme court of said Territory, whereon they are seeking a review of such order of continuance in said supreme court, with directions to said circuit court to proceed to try said cause at said next April term thereof, which trial, if forced by the action of said territorial courts pending said appeal, could only result in a judgment in favor of the defendants in said action on said bond and against said plaintiff or in a judgment of dismissal or nonsuit, and that in the event said action on said bond should be so disposed of by said circuit court a new action on said bond for the value of said property could not be maintained against said executors, the bar of said statute of limitations having long since become complete against the maintenance of such new action, and that in such event the further prosecution of said appeal, even although the same should result in a decision and judgment by this honorable Supreme Court of the United States reversing the judgment of the supreme court of said Territory in said cause and affirming the judgment of said circuit court in said cause, would nevertheless be ineffectual and idle, and wholly fruitless to said appellant.

And further affiant saith not.

WM. W. BIERCE.

Subscribed and sworn to before me this 24th day of February,
A. D. 1906.

MARION L. SPITLER,
United States Commissioner.

129 UNITED STATES OF AMERICA,
Territory of Oklahoma, ss:

I, B. D. Shear, the duly appointed, qualified, and acting clerk of the district court for the third judicial district of Oklahoma Territory, do hereby certify that the Honorable B. F. Burwell, judge of said court, did on the 18th day of May, A. D. 1903, appoint Marion L. Spitler a United States commissioner in and for said district.

I further certify that on the said 18th day of May, A. D. 1903, the said Marion L. Spitler, appointed as aforesaid, did duly qualify, take the oath of office, and assume the duties of said office; that said appointments so made has never been suspended or revoked, and that the said Marion L. Spitler is now and has been ever since said 18th day of May, A. D. 1903, the duly appointed, qualified, and acting United States commissioner in and for said district.

Witness my official signature and the seal of said court this 24th day of February, A. D. 1906.

[Seal District Court, Territory of Oklahoma.]

B. D. SHEAR,
Clerk of said Court.
ANNE HOOVER,
Deputy Clerk.

(20519)

130 Supreme Court of the United States, October Term, 1905.

No. 607.

WILLIAM W. BIERCE, LIMITED, Appellant,

vs.

CLINTON J. HUTCHINS, Trustee.

On consideration of the motion for a supersedeas in this cause,
It is now here ordered by the Court that the bond heretofore given herein operate as a supersedeas and that the judgment be superseded accordingly.

MARCH 5, 1906.

Indorsement: File No. —. Supreme Court of the United States,
October Term, 190—. Term No. —. Filed — 190—.

Supreme Court of the United States.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing pages numbered from one to twelve, inclusive, contain true copies of the Motion for a writ of

supersedeas and affidavit in support thereof and of the order of said Supreme Court entered thereon in the case of William W. Bierce, Limited, Appellant, vs. Clinton J. Hutchins, Trustee, No. 607 October Term, 1905, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this 10th day of March, A. D. 1906.

[SEAL.] (Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Assignment of Errors.

In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Appellant,
vs.
CLINTON J. HUTCHINS, Trustee, Appellee.

And now comes the Appellant, William W. Bierce, Limited, a corporation, by Charles H. Aldrich, Henry S. McAuley, Henry W. Prouty and A. G. M. Robertson, its attorneys, and upon the allowance of its appeal herein to the Supreme Court of the United States, presents and files herein its assignment of errors, as to which matters and things it says that in the record and proceedings aforesaid of said Supreme Court of the Territory of Hawaii in the above entitled cause, wherein William W. Bierce, Limited, was plaintiff and Clinton J. Hutchins, Trustee, was defendant, and in the rendition of the final judgment therein, manifest error has intervened to the great prejudice and injury of said William W. Bierce, Limited, in the following, among other things, to-wit:

First. Said Supreme Court of the Territory of Hawaii erred in entering judgment in said cause reversing the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of said appellant for the return of the property in controversy in said cause, or in case the same should not be returned, for the value thereof, found to be the sum of Twenty-two Thousand Dollars (\$22,000.00) and interest thereon, and sustaining the exceptions of said appellee in so far as they raised the question of election.

132 Second. Said Supreme Court of the Territory of Hawaii erred in not affirming in all things the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of said appellant and against said appellee for the return of the property in controversy in said cause into the possession of said appellant, and for the sum of One Thousand and Forty-five Dollars (\$1045.00) damages for the detention of said property, together with costs of suit taxed at the sum of Fifty Dollars and Fifty Cents (\$50.50), or in the alternative, in case said property should not be so returned, for the value thereof

found and adjudged to be the sum of Twenty-two Thousand Dollars (\$22,000.00) and for the sum of One Thousand and Forty-five Dollars (\$1045.00) damages for the detention thereof, together with costs of suit taxed at the sum of Fifty Dollars and Fifty Cents (\$50.50).

Third. Said Supreme Court of the Territory of Hawaii erred in sustaining the exceptions of said appellee, and each of them in said cause, in so far as such exceptions raised the question of an election by said appellant between inconsistent remedies, or between inconsistent remedial rights.

Fourth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-second exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-second exception is in the words and figures as follows to-wit:

"Immediately thereafter plaintiff proposed the following finding:

"That the contract of March 13th, 1901, was an entire contract and intended so to be, for a lump sum consideration which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and nonlienable items thereof; to which finding the defendant objected as follows:

"Defendant objects to the 6th proposed finding of fact upon the ground that said so-called finding contains mixed questions of law and fact, and upon the further ground that the evidence in said cause shows that the said contract of March 13th, 1901, was not an entire contract, nor intended so to be, but was a contract supplementary to the contract of February 21st, 1900.

133 "The Court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted and said ruling is here and now assigned as error by said defendant."

Fifth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-seventh exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-seventh exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action; to which findings the defendant objected as follows:

"Defendant objects to the 11th proposed finding of fact upon the ground that the same contains mixed questions of law and fact, and upon the further ground that the same is not supported by the evidence in said action.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Sixth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-eighth exception of said appellee to the find-

ing of said Circuit Court in said cause, which said twenty-eighth exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not intend to and did not in fact waive its title by bringing the action to enforce a materialman's lien against the Kona Sugar Company, Limited, and its Receiver; to which finding the defendant objected as follows:

"Defendant objects to the 12th proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Seventh. Said Supreme Court of the Territory of Hawaii erred in sustaining the fortieth exception of said appellee to the conclusion of law of said Circuit Court in said cause, which said fortieth exception is in the words and figures as follows, to-wit:

134 "Immediately thereafter plaintiff proposed the following conclusion of law:

"That the contract of March 13th, 1901, was an entire contract for a lump sum consideration and contained lienable and nonlienable items; to which conclusion the defendant objected as follows:

"Defendant objects to the 6th proposed conclusion of law upon the ground that the same is not supported by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling of the court is here and now assigned as error by said defendant."

Eighth. Said Supreme Court of the Territory of Hawaii erred in sustaining the forty-first exception of said appellee to the conclusion of law of said Circuit Court in said cause, which said forty-first exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following conclusion of law:

"That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action; to which conclusion the defendant objected as follows:

"Defendant objects to the 7th proposed conclusion of law upon the ground that the same is not supported by any finding of fact herein, nor by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Ninth. Said Supreme Court of the Territory of Hawaii erred in ruling that said appellant was estopped from maintaining said action of replevin for the property in controversy in said cause, for the reason that said appellant had previously elected to pursue a remedy inconsistent therewith, namely, by bringing the action for the price of said property and to enforce a materialman's lien for the same.

Tenth. Said Supreme Court of the Territory of Hawaii erred in ruling that by bringing the action to enforce a materialman's lien

for the price of the property in controversy in said cause, said appellant made a binding election to waive performance of the
135 condition precedent reserved to it in the contract of March 13th, 1901, between said appellant and The Kona Sugar Company, Limited, in pursuance of which said property was delivered to said sugar company, namely, payment in full of the promissory note in controversy in said cause, and to treat the title to said property as in said The Kona Sugar Company, Limited, or the receiver thereof, such as to preclude said appellant from maintaining said action of replevin for the possession of said property.

Eleventh. Said Supreme Court of the Territory of Hawaii erred in holding and construing said conditional sale contract of March 13th, 1901, in controversy in said cause, to be a severable contract and not an entire contract such as to prevent a severance of the price of the lienable items from the price of the nonlienable items of the property or materials in controversy in said cause.

Twelfth. Said Supreme Court of the Territory of Hawaii erred in not holding that said appellant had no right to maintain the materialman's lien proceedings, and that its attempt to exercise such nonexistent right was a mistake of remedy made in ignorance of its legal rights, and as such did not amount to an election between inconsistent remedies or remedial rights, such as to preclude said appellant from maintaining said action of replevin for the property in controversy in said cause.

Thirteenth. Said Supreme Court of the Territory of Hawaii erred in not holding that the special findings of fact by said Circuit Court were sufficient to sustain the said judgment of said Circuit Court.

Fourteenth. Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said appellee to the entering of said judgment by said Circuit Court in said cause which were sustained by the said Supreme Court.

136 Fifteenth. Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said appellee to the rulings of said Circuit Court in said cause which were sustained by said Supreme Court.

Sixteenth. Said Supreme Court of the Territory of Hawaii erred in denying the petition of said appellant for a rehearing in said cause.

Wherefore, the said William W. Bierce, Limited, appellant prays that for the errors aforesaid and other errors appearing in the record of said Supreme Court of the Territory of Hawaii in the above entitled cause to the prejudice of said appellant the said judgment of the said Supreme Court of the Territory of Hawaii be reversed, annulled, and for naught esteemed, and that the said judgment of the said Circuit Court of the First Judicial Circuit, of the Territory of Hawaii be in all things affirmed, etc., to the end that justice may be done in the premises.

(Signed)

(Signed)

(Signed)

(Signed)

CHARLES H. ALDRICH,

HENRY S. McAULEY,

HENRY W. PROUTY,

A. G. M. ROBERTSON,

Attorneys for Appellant.

Indorsement: Supreme Court Territory of Hawaii. William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee. Assignment of Errors. Filed January 13, 1906. George Lucas, Clerk.

137 That said witness also testified that he had with him in the record of said Supreme Court the judgment for costs and order vacating the said order of May 6th, also the mandate of the United States Supreme Court, and, upon his producing the same, plaintiff offered same in evidence and same were received and read in evidence and marked "Plaintiff's Exhibit Y," said documents respectively being in words and figures as follows:

138 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Order.

Whereas, in the above entitled cause, upon the plaintiff's appeal to the Supreme Court of the United States from the judgment of this Court heretofore made and entered herein, in and by which the judgment of the Circuit Court of the First Judicial Circuit was reversed, said Supreme Court did, on the 8th day of April, 1907, render its opinion and issue its mandate reversing the judgment of this Court, with costs, and remanding said cause to this Court for further proceedings in conformity with said opinion:

Now therefore, it is hereby ordered and adjudged that the judgment made and entered in this Court and cause on the 6th day of May, 1905, be and the same is vacated and set aside.

It is further ordered and adjudged that the plaintiff, William W. Bierce, Limited, recover from and against the said defendant, its costs as taxed in the Supreme Court of the United States amounting to the sum of \$518.57, and also its costs herein expended, taxed at \$230.00.

It is also ordered that said cause be placed on the calendar for the October 1907 Term for further proceedings.

Dated, Honolulu, September 27th, 1907.

By the Court:

[SEAL.]

(Signed)

J. A. THOMPSON, Clerk.

O. K.

C. & W.

Indorsement: Supreme Court Territory of Hawaii. William W. Bierce, Ltd. v. Clinton J. Hutchins, Trustee. Order. Filed September 27, 1907, at 11:45 A. M. J. A. Thompson, Clerk.

139 UNITED STATES OF AMERICA, ss:

[SEAL-] The President of the United States of America to the
Honorable the Judges of the Supreme Court of the
[United States for the]* Territory [District]* of Ha-
waii, Greeting:

Whereas, lately in the Supreme Court of the [United States for the]* Territory [District]* of Hawaii before you or some of you, in a cause between William W. Bierce, Limited, plaintiff, and Clinton J. Hutchins, Trustee, defendant, wherein the decree of the said Supreme Court, entered in said cause on the 6th day of May, A. D. 1905, is in the following words, viz:

"Now on this 6th day of May, 1905, the same being one of the regular court days of the October Term of said Court, the above cause coming on for further consideration on the plaintiff's motion for a modification of the original decision herein made and filed on January 28, 1905, so as to direct that the above cause be remanded to the Circuit Court of the First Circuit with directions to enter judgment for the defendant with costs, and said motion having been granted, and said order having been entered on this date.

Now therefore it is considered by the Court and is now ordered and adjudged that the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in favor of the plaintiff for the return of the property in controversy in the above cause, or in case the same should not be returned, for the value thereof, found to be the sum of \$22,000.00 and interest thereon, be and the same is hereby reversed, and the exceptions, in so far as they raise the question of election, are sustained, and the said cause is hereby remanded to the said Circuit Court with directions to enter judgment for the defendant with costs.

Entered this 6th day of May, A. D. 1905.

By the Court.

(Signed)

GEORGE LUCAS,

Clerk of the Supreme Court of the Territory of Hawaii."

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and six, the said cause
140 came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby reversed with costs; and that the said plaintiff, William W. Bierce, Limited, recover against the

[* Words enclosed in brackets erased in copy.]

said defendant Five Hundred and eighteen dollars and fifty-seven cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings in conformity with the opinion of this Court.

April 8, 1907.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of May, in the year of our Lord one thousand nine hundred and seven.

Costs of plaintiff:

Clerk	\$223.15
Printing Record	275.42
Attorney	20.00
	<hr/>
	\$518.57

(Signed)

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

141 Supreme Court of the United States, October Term 1906.

Costs of William W. Bierce, Limited, in No. 212.

1905, October Term—Docketing cause and filing record, \$5.00; appearance, .25; filing preceipe and receipts .75; filing papers, \$3.25; filing motion, .25; [filing briefs, \$5.00;]* submission, .20; order, .20; continuance, .25	\$10.15
1906, October Term—Transfer, \$1.00; appearance, .25; filing preceipe [and receipt,]* .25; filing papers, \$4.25; filing briefs, \$5.00; argument, .20; [submission, .20;]* judgment, \$1.00; filing same, .25; recording, .40; mandate, \$5.00; preparing record for printer etc., \$195.00; cost of printing record, \$275.42; attorney's docket fee, \$20.00; costs and copy, .40;	508.42
	<hr/>
	\$518.57

Fee book, page 20,109.

Test:

(Signed)

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

[* Words and figures enclosed in brackets erased in copy.]

Indorsements: File No. 20,109. Supreme Court of the United States No. 212, October Term, 1906. William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee. Mandate. Filed August 16, 1907, at 9:55 o'clock A. M. J. A. Thompson, Clerk. In the Supreme Court of the Territory of Hawaii. William W. Bierce, Limited vs. Clinton J. Hutchins, Tr.

142 That said witness also testified that he had with him in the record of said Supreme Court the defendant's assignment of errors, and, upon his producing the same, plaintiff offered it in evidence and same was received and read in evidence and marked "Plaintiff's Exhibit XX," same being in words and figures as follows:

143 In the Supreme Court of the United States.

WILLIAM W. BIERCE, LIMITED, a Corporation, Appellee,

vs.

CLINTON J. HUTCHINS, Trustee, Appellant.

Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes Clinton J. Hutchins, Trustee, Appellant in the above entitled action, and says that in the record of the proceedings in the said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:

1. That said Supreme Court of the Territory of Hawaii erred in overruling appellant's exceptions and in affirming the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, against said appellant for the return of the property in controversy in said cause, or, in case the same should not be returned, the value thereof, found to be in the sum of \$22,000, and interest thereon.

2. That said court erred in denying appellant's petition for rehearing, and in refusing and failing to pass upon the several grounds set forth in said petition.

3. That there was error in holding that the findings are supported by undisputed evidence in so far as they are findings of material facts and not statements of legal conclusions or immaterial facts varying and contradicting written instruments.

4. That there was error in holding that the findings are supported by undisputed evidence in this: That the Supreme Court of Hawaii, on the 28th day of January, 1905 (16 Haw. 418), decided by its opinion that day rendered that the said findings were not

144 sustained according to the uncontradicted evidence in the case and that at the time of this decision the Supreme Court of Hawaii was the court of last resort for the case, as no federal question was involved, and that said decision became the law of the case and was binding upon all parties.

5. That there was error in holding that upon these facts so found the decision of the Supreme Court of the United States rendered in this action is conclusive against the defendant's contention, and in refusing to consider other facts in the case appearing in the evidence, which facts are decisive in favor of the defendant's contention.

6. That there was error in holding that each and every one of the findings of fact is sustained by the evidence, and particularly that the 6th finding of fact is sustained by the evidence, viz., that the contract of March 13, 1901, was an entire contract and intended so to be for a lump sum consideration, which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of lienable and nonlienable items thereof; and also the 4th and 6th conclusions of law are well taken, that the payment of \$10,000, the giving of the note secured by bonds of the Kona Sugar Company was not had or given as a consideration for the purchase price of the material sued for, and that the contract of March 13, 1901, was an entire contract for a lump sum consideration, particularly in view of the fact that said court had, upon the 28th day of January, 1905, decided that said findings were not sustained by the evidence and were erroneous, which findings became the law of the case and conclusive on the parties.

7. That the court erred in holding that what the parties intended the written instrument of March 13, 1901, to be is plainly immaterial.

145 8. That the Court erred in holding that the findings of the trial court are not open to dispute in any event, and not, as contended, that they were not open to dispute in the Supreme Court of the United States, for the reason that they had been adopted for the purpose of the case by the Supreme Court of the Territory of Hawaii, and that this is a misconstruction of the opinion of the Supreme Court of the United States, since that court cannot go into the evidence but must take the ultimate facts found by the Supreme Court of the Territory of Hawaii, while the Supreme Court of Hawaii has the right to determine whether the evidence supports the findings.

9. That the court erred in overruling the exception of this defendant to the judgment as contrary to the law and the evidence and the weight of the evidence, on the ground that the court had no authority to render an alternative judgment or money judgment in an action of this character; and on the further ground that the judgment should show the separate value of the different articles sued for in order that the defendant might return any portion of said articles that he was able to return.

10. That the court erred in overruling the last named exception of this defendant, on the further ground that the entry of the judgment was contrary to the law and the evidence and the weight of the evidence, since the evidence showed that there was another action pending for the same property, viz., an action in intervention to recover the value of the same out of the proceeds of sale.

11. That the court erred in overruling said last named exception of this defendant to the entry of the judgment as contrary to the

146 law and the evidence and the weight of the evidence, since the evidence showed that this respondent acquired his title at a receiver's sale ordered for the purpose of paying the expenses of a receivership, which receivership was carried on under the direction and for the benefit and at the request of the plaintiff, and, further, for the payment of mortgage bonds secured upon this property, with the knowledge and concurrence of the plaintiff, as to the holders of which bonds the plaintiff was estopped to make any claim to the property or the proceeds.

12. That the court erred in overruling said last named exception of this defendant to the entry of the judgment as contrary to the law and the evidence and the weight of the evidence, since the evidence showed that the plaintiff waived its right to re-take said property or to make any claim thereto as against this defendant, the successor in interest to said Receiver, his creditors and said bondholders, as well as said Kona Sugar Company, Limited.

13. That the court erred in overruling the exception of this defendant to the amendment made March 7, 1904, since that amendment changed the character of the action and increased the *ad damnum* from \$15,000 to \$20,000, materially changing the liability of this defendant and his rights and obligations under the bonds given in said action, and also materially changing the claim of the plaintiff subsequently to the property being taken on a re-delivery bond.

14. That the court erred in overruling the exception to the finding of the court below that the actual value of the articles sued for was at the time of bringing the action and at the time of judgment the sum of \$22,000, on the ground that the said sum was in excess of the amount actually claimed by the plaintiff in the complaint and affidavit; and on the further ground that the finding did not

147 set out the separate value of each different article comprising the property referred to in said finding; and further erred in connection with making said finding in amending the complaint increasing the amount claimed from \$20,000 to \$22,000 in order to conform with the proof over the objection and exception of this defendant.

15. That the court erred in overruling the exception of this defendant to the ruling of the court below in excluding the evidence of the witness M. F. Scott as to the condition of the railway material, and to the exclusion of the evidence of said witness upon the difference in the appearance and condition of the rails and the engines and whether the engines worked less well now than on the day when defendant took possession; and also in striking out the evidence of said witness that, with certain exceptions, the material and equipment was in good working order at the time of the trial.

16. That the court erred in overruling the exception of this defendant to the 4th finding of fact in the Circuit Court, on the ground that the same was not in accordance with the uncontradicted evidence; and on the further ground that at the hearing of this cause in the Supreme Court of the Territory of Hawaii on January 26, 1905, it was determined that said finding was not in accordance with

the evidence, which was a final determination and not subject to appeal to this Court.

17. That the court erred in overruling the exception of this defendant to the 6th finding of fact, on the ground that the contract of March 13, 1901, was not an entire contract, nor intended to be, but was a contract supplementary to the contract of February 21, 1900; and, further, that the said Supreme Court of the Territory of Hawaii, on the 28th day of January, 1905, finally determined that said 6th finding of fact was not in accordance with the uncontradicted evidence, which determination was not subject to review by this court.

148 18. That the court erred in overruling the exception of this defendant to the 11th finding of fact, on the ground that the same was not supported by the uncontradicted evidence in the action; and, further, that this was finally determined by the said Supreme Court of the Territory of Hawaii on the 28th day of January, 1905, and that the same was not subject to review by this court.

19. That the court erred in overruling the objection of this defendant to the 12th finding of fact, on the ground that the same was not supported by the uncontradicted evidence in the action.

20. That the court erred in overruling the exception to the 13th finding of fact, on the ground that the uncontradicted evidence showed a rescission of the contract of March 13, 1901, so far as it sought to reserve the title in the property sued for as against this defendant and the Receiver of said Kona Sugar Company, the creditors of said Receiver and the holders of the mortgage bond of said Company.

21. That the court erred in overruling the exception of this defendant to the second conclusion of law made by the Circuit Court.

22. That the court erred in overruling the exception of this defendant to the fourth conclusion of law.

23. That the court erred in overruling the exception of this defendant to the sixth conclusion of law.

24. That the court erred in overruling the exception of this defendant to the seventh conclusion of law.

25. That the court erred in rendering its decision and judgment in favor of the plaintiff and against the defendant in error for that portion of the property sued for which was attached to the soil, on

149 the ground that the same was a fixture and not the subject of an action of replevin, and on the further ground that the plaintiff were estopped to claim said property, the same having been affixed to the soil with its knowledge and consent.

Feb. 25th,

Dated, Honolulu [May 6,] * A. D. 1908.

(Signed)

JOHN W. CATHCART,

(Signed)

CASTLE & WITHINGTON,

Attorneys for Clinton J. Hutchins,

Trustee, Appellant.

Indorsement: Original — No. Supreme Court of the United States [Territory of Hawaii.]* William W. Bierce, Limited, Appellee, vs. Clinton J. Hutchins, Trustee, Appellant. Assignment of Error. Filed May 7, 1908, J. A. Thompson, Clerk. Castle & Withington John W. Cathcart Attorneys for Appellant.

150 That said witness also testified that he had with him in said record the decision of the Supreme Court of Hawaii on defendant's exceptions, filed March 4, 1908, and the notice of decision to the circuit court of the same date, and upon his producing the same, plaintiff offered the same in evidence and same were received and read in evidence and marked "Plaintiff's Exhibit AA", same being in words and figures as follows:

151 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

WILLIAM W. BIERCE, Limited, a Corporation, Plaintiff-Appellee,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant-Appellant.

Exceptions from Circuit Court, First Circuit.

Decision on Exceptions.

In the above entitled cause, the defendant's exceptions are overruled, pursuant to the opinion of said Court filed herein December 20, 1907.

Dated, Honolulu, March 4th, 1908.

By the Court:

(Signed)

J. A. THOMPSON,
Clerk Supreme Court.

H.

Indorsement: Supreme Court Territory of Hawaii. October Term, 1907. William W. Bierce, Limited, Plaintiff-Appellee, v. Clinton J. Hutchins, Trustee, Defendant-Appellant. Decision on Exceptions. Filed March 4th, 1908, at 11:10 o'clock a. m. J. A. Thompson, Clerk.

[* Words enclosed in brackets erased in copy.]

152 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff-Appellee,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant-Appellant.

Exceptions from Circuit Court, First Circuit.

Notice of Decision on Exceptions.

To the Honorable J. T. De Bolt, First Judge, Circuit Court, First Circuit:

You are hereby notified that in the above entitled cause the Supreme Court has made the following decision:

"Decision on Exceptions.

"In the above entitled cause, the defendant's exceptions are over-ruled, pursuant to the opinion of said court filed herein December "20, 1907."

By the Court:

(Signed)

[SEAL.]

J. A. THOMPSON,
Clerk Supreme Court.

March

Honolulu, [February]* 4th, 1908.

Indorsement: Supreme Court Territory of Hawaii. October Term, 1907. William W. Bierce, Limited, Appellee, v. Clinton J. Hutchins, Trustee, Appellant. Notice of Decision on Exceptions. Filed March 4, 1908, at 11:10 o'clock a. m. J. A. Thompson, Clerk. Copy.

153 That said witness also testified that he had with him from the files of said circuit court the record in the Estate of Henry Waterhouse, deceased, being record Number 3669, Probate Division, and said witness produced from said record the petition for the probate of the will of said decedent filed February 24, 1904, the order of court for notice of hearing on said petition, the affidavit of publication of said notice filed April 4, 1904, the letters testamentary issued to William Waterhouse and Albert Waterhouse, dated April 5, 1904, the order of probate filed on the same date, the affidavit of publication of notice to creditors, and the will of said Henry Waterhouse, deceased, all of which plaintiff then offered in evidence and the same were received and read in evidence and marked "Plaintiff's Exhibit BB," said documents respectively being in words and figures as follows:

[* Words enclosed in brackets erased in copy.]

154 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

In Probate. At Chambers.

(\$2. Stamps)

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Petition for Probate of Will.

To the Honorable Presiding Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

The petition of Albert Waterhouse of Honolulu, Island of Oahu, Territory of Hawaii, respectfully shows:

That the said Henry Waterhouse died at Honolulu, Island of Oahu, Territory of Hawaii on or about the 20th day of February, 1904; that at the time of his death said Henry Waterhouse was a resident of said Honolulu, and left an estate and property in said Honolulu, Territory of Hawaii and elsewhere; that the character and value of said property situate in the said Territory of Hawaii are as follows, to wit,

Real property situate in Honolulu, Island of Oahu, Territory of Hawaii, and elsewhere, the probable value whereof is about Eighty Thousand Dollars (\$80,000.).

Personal property, consisting of stocks, bonds, notes, live-stock, life insurance, horses, carriages, furniture and situate in said Honolulu and elsewhere of the probable value of One Hundred and Sixty Thousand Dollars (\$160,000.).

That in addition to the aforesaid property the said Henry Waterhouse, deceased, left certain real property in Cedar Rapids, State of Iowa, the value whereof is unknown to your petitioner.

155 That said Henry Waterhouse, deceased, left a will bearing date the 24th day of March, 1903, which said will is herewith filed in said Court, and which said will your petitioner alleges to be the last will and testament of said deceased; that said will was duly executed by said deceased in his life-time, in said Honolulu, Territory of Hawaii, in the presence of Percy M. Pond and Antonio Q. Marcallino, the subscribing witnesses thereto, both of whom then resided and now reside in said Honolulu; that said deceased acknowledged the execution of the same in their presence and declared the same to be his last will and testament, and that said witnesses at the request of said testator and in his presence and in the presence of each other subscribed their names as witnesses thereto. That after the execution of said will, to wit, on the 13th day of April, 1903, the said Henry Waterhouse, deceased, duly executed a codicil to said last will and testament, which said codicil is herewith filed in said court, and which said codicil your petitioner alleges was duly executed by said deceased in his lifetime in said Honolulu in the presence of Edwin Benner

and Antonio Q. Marcallino, the subscribing witnesses thereto, both of whom then resided and now reside in said Honolulu, Territory aforesaid; that said deceased acknowledged the execution of the same in their presence and declared the same to be a codicil to his last will and testament, and said witnesses at the request of said testator and in his presence and in the presence of each other subscribed their names as witnesses thereto. That your petitioner has made diligent search for any other wills or codicils of said deceased, but has been unable to find the same, and therefore alleges the foregoing last will and testament of the said Henry Waterhouse, deceased, and the said codicil to be the only codicil to said last will and testament.

156 That the said decedent at the time of the execution of said will and said codicil thereto as aforesaid was of the age of fifty-eight years and was of sound and disposing mind and in every other respect competent to devise and bequeath his said estate.

That William Waterhouse, brother of said deceased, and your petitioner Albert Waterhouse, a son of the said deceased, are named in said will as the executors thereof.

That the said Albert Waterhouse consents to act as such executor.

That the names, ages and residences of the heirs, devisees and legatees of said deceased and in said last will and testament and codicil thereto named are as follows:

Ida Whan Waterhouse, widow of said deceased, aged 42 years, and residing in said Honolulu, Territory aforesaid;

Eleanor Waterhouse Wood, a daughter of said deceased, aged about 34 years, and residing in said Honolulu, Territory aforesaid;

Mary Stangenwald Corbett, a daughter of said deceased, aged about 32 years and residing at Middletown, New York;

And your petitioner Albert Waterhouse, a son of said deceased, aged 24 years, and residing at said Honolulu, Territory aforesaid;

That by said last will and testament it is provided that no bond shall be required of said executors.

Wherefore, your petitioner Albert Waterhouse prays that the said will and said codicil thereto may be admitted to probate and Letters Testamentary be issued to the said William Waterhouse and your petitioner Albert Waterhouse without their giving the bond required by law for the faithful performance of the duties of the

157 trust as such executors; and for that purpose that this Honorable Court will appoint a day and time for the hearing of this petition and order due notice thereof to be given by publication to all persons interested herein according to law.

Signed)

ALBERT WATERHOUSE,

Petitioner.

(Signed) SMITH & LEWIS,

Attorneys for Petitioner.

TERRITORY OF HAWAII,
Island of Oahu, ss:

Albert Waterhouse, being first duly sworn deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

(Signed)

ALBERT WATERHOUSE.

Subscribed and sworn to before me this 23rd day of February, 1904.

(Signed)

[SEAL.]

ROYAL D. MEAD,
*Notary Public, First Judicial
Circuit, Territory of Hawaii.*

Indorsement: P. 3669. 21/368. Circuit Court First Circuit. Territory of Hawaii. At Chambers. In Probate. In the Matter of the Estate of Henry Waterhouse, Deceased. Petition for Probate of Will. Filed February 24, 1904. J. A. Thompson, Clerk. Smith & Lewis, Attorneys at Law. Judd Building, Honolulu, T. H.

158 In the Circuit Court of the First Circuit, Territory of Hawaii.

At Chambers. In Probate.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Order for Notice of Hearing Petition for Probate of Will.

A Document purporting to be the last Will and Testament of Henry Waterhouse, deceased, and also a document purporting to be a codicil to said last Will and Testament having on the 24th day of February, A. D. 1904, been filed in the Circuit Court of the First Judicial Circuit, Territory of Hawaii in probate, and a petition for the Probate thereof and for the issuance of Letters Testamentary to William Waterhouse and Albert Waterhouse having been filed by the said Albert Waterhouse of Honolulu Territory of Hawaii;

It is hereby ordered, that Monday, the 4th day of April, A. D. 1904, at ten o'clock A. M., of said day at the Court Room of said Court, in the Judiciary Building in said Honolulu be and the same hereby is appointed the time and place for proving said Will and Codicil and hearing said petition.

It is further ordered, that notice thereof be given by publication, once a week for three successive weeks, in the Pacific Commercial Advertiser a newspaper published in the English language in said

Honolulu, the last publication to be not less than ten days previous to the time therein appointed for hearing.

Dated at Honolulu, Oahu, T. H., February 24, A. D. 1904.

(Signed)

GEO. D. GEAR,
Second Judge of said Circuit Court.

Attest:

(Signed) WM. R. SIMS, *Clerk.*

Indorsement: Circuit Court First Circuit. In Probate. At Chambers. In the matter of the Estate of Henry Waterhouse, Deceased. Order for Notice of Hearing Petition for Probate of Will. Filed February 24, 1904. J. A. Thompson, Clerk.

159

Affidavit of Publication.

In the Circuit Court of the First Circuit, Territory of Hawaii.

At Chambers. In Probate.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Order for Notice of Hearing Petition for Probate of Will.

A Document purporting to be the Last Will and Testament of Henry Waterhouse, deceased, and also a document purporting to be a Codicil to said Last Will and Testament having on the 24th day of February A. D. 1904, been filed in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in Probate, and a Petition for the Probate thereof and for the issuance of Letters Testamentary to William Waterhouse and Albert Waterhouse having been filed by the said Albert Waterhouse of Honolulu Territory of Hawaii;

It is hereby ordered, that Monday the 4th day of April, A. D. 1904, at ten o'clock a. m., of said day, at the court room of said Court in the Judiciary Building, in said Honolulu, be and the same hereby is appointed the time and place for proving said Will and Codicil and hearing said petition.

It is further ordered, that notice thereof be given, by publication, once a week for three successive weeks, in the Pacific Commercial Advertiser, a newspaper published in the English language in said Honolulu, the last publication to be not less than ten day- previous to the time therein appointed for hearing.

Dated at Honolulu, Oahu, T. H. February 24, A. D. 1904.

GEO. D. GEAR,
Second Judge of said Circuit Court.

Attest:

WM. R. SIMS, *Clerk.*

Smith & Lewis, attorneys for petitioner. 6724. Feb. 25, Mar. 3, 10, 17.

Edward Dekum of The Hawaiian Gazette Co. Ltd., Honolulu H. I., being sworn says that he has examined a file of the Pacific Commercial Advertiser a Daily Newspaper published in the English language at Honolulu and that the notice of which the annexed is a printed copy, was published in said newspaper four times [consecutively from]* Feb. 25, March 3d, 10th and 17th 1904 to — 190— and that the last publication was not less than ten days previous to the time therein appointed for the hearing.

(Sig.)

EDWARD DEKUM.

Subscribed and sworn to before me this 4th day of April, 1904.

(Sig.)

WM. J. FORBES,

Notary Public, First Judicial Circuit. [SEAL.]

Endorsed: Circuit Court, First Circuit, Territory of Hawaii. In the Matter of the Estate of Henry Waterhouse, Deceased. Affidavit of Publication of Time and Place of Proving Will and Codicil. Filed April 4th, 1904. Wm. R. Sims, Clerk.

160 In the Circuit Court of the First Circuit, Territory of Hawaii.

At Chambers. In Probate.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Order of Probate.

On this 4th day of April, 1904, before me Circuit Judge of said Court, came on to be heard the petition of Albert Waterhouse praying that documents alleged to be the last Will and Testament of said deceased and a codicil to said last will and testament, be admitted to probate, and that Letters Testamentary be granted to William Waterhouse and said Albert Waterhouse;

And it appearing that sufficient notice of this hearing has been given to all parties concerned, the Court finds the following facts from the evidence adduced:

That said Henry Waterhouse died on or about the 20th day of February, 1904, at Honolulu, Oahu, Territory aforesaid; that said alleged will was executed by said Henry Waterhouse on the 24th day of March 1903, at said Honolulu, Territory aforesaid, in the presence of Percy M. Pond and Antonio Q. Marcallino as subscribing witnesses thereto; that said codicil to said will was executed by said Henry Waterhouse on the 13th day of April 1903, at said Honolulu, Territory aforesaid in the presence of Edwin Benner and said Antonio Q. Marcallino as subscribing witnesses thereto; that said testator at the time of the execution of said Will and said Codicil was of sound and disposing mind, and was competent to make said Will and codicil, and that the said Will and Codicil was duly

[* Words and figures enclosed in brackets erased in copy.]

executed as required by law, and that in said Will said testator
named said William Waterhouse and said Albert Waterhouse
161 as Executors of said last Will and Testament.

Wherefore, it is ordered, that said documents now in Court,
and hereto attached, are hereby admitted to Probate as the last Will
and Testament and Codicil thereof of said Henry Waterhouse, de-
ceased.

And it is further ordered, that Letters Testamentary thereon issue
to said William Waterhouse and said Albert Waterhouse, who shall
serve as such without bonds, it being expressly provided in said Will
that no bond shall be required of said executors; that a notice to
creditors be published once a week for five weeks in the Evening
Bulletin, a newspaper printed and published in said Honolulu, and
that an inventory of the estate of said deceased be filed within

G. D. G.—J. [thirty]* days from the date hereof.

(Signed)

GEO. D. GEAR,

*Second Judge of said Circuit
Court of the First Circuit.*

Honolulu, April 4th, 1904.

Attest:

(Signed) WM. R. SIMS,

*Clerk of said Circuit Court
of the First Circuit.*

Indorsement: P. 3669. Circuit Court First Circuit Territory of
Hawaii. At Chambers. In Probate. In the Matter of the Estate
of Henry Waterhouse, deceased. Order of Probate. Filed April
4th, 1904. Wm. R. Sims, Clerk. Smith & Lewis Attorneys at
Law. Judd Building, Honolulu, T. H.

162 In the Circuit Court of the First Circuit, Territory of Hawaii.

At Chambers. In Probate.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Letters Testamentary.

The last Will and Testament and Codicil thereto of Henry Water-
house, deceased, copies whereof are hereto annexed, having been
duly admitted to Probate in this Court, William Waterhouse and
Albert Waterhouse, who are named therein as Executors, are hereby
authorized to perform the duties of Executors of said Will and
Codicil.

By order of the honorable G. D. Gear, Judge of the Circuit Court
of the First Circuit this 5th day of April, 1904.

(Signed)

[SEAL.]

GEORGE LUCAS,

*Clerk of said Circuit Court
of the First Circuit.*

(\$1. Stamp.)

Indorsement: Circuit Court, First Circuit. In Re Estate of Henry Waterhouse. Letters Testamentary. Filed April 5, 1904. George Lucas, Clerk. Smith & Lewis, Attorneys at Law. Judd Building, Honolulu, T. H.

163 This is the last Will and Testament of me Henry Waterhouse in the Island of Oahu Territory of Hawaii, Hereby revoking and making null and void all previous Wills and Testamentary acts by me at any time made. After my just debts and funeral expenses are paid, I devise and bequeath to my wife Ida Whan Waterhouse all my personal property consisting of Furniture, Horses & Carriages at the homestead Nuuanu Street, also for her life the said homestead known as the Dimond homestead and purchased by me from my daughter Mary Stangenwald Corbett, and at the death of Ida Whan Waterhouse, one third of said property to go to my daughter Eleanor Waterhouse Wood to her and her heirs for her and their own use forever.

One third to my daughter Mary Stangenwald Corbett of said property to her and her heirs for her and their own use forever. To my son Albert Waterhouse One third of said property to him and his heirs for his and their own use forever. I give and bequeath to my wife Ida Whan Waterhouse of said Honolulu, One fourth of all the residue of my estate real or mixed, of which I shall be seized or possessed, or to which I shall be entitled at the time of my death, I give, devise and bequeath to my daughter Eleanor Waterhouse Wood of said Honolulu, One fourth of all the residue of my estate real or mixed, of which I shall be entitled at the time of my death, I give, devise and bequeath to my daughter Mary Stangenwald Corbett, one fourth of all the residue of my estate real or mixed, of which I shall be seized or possessed or to which I shall be entitled at the time of my decease. I give, devise and bequeath to my son Albert Waterhouse, one fourth of all the residue of my estate real or mixed, of which I shall be seized or possessed, or to which I shall be entitled at the time of my decease.

164 I hereby nominate and appoint my son Albert Waterhouse and my brother William Waterhouse (of Pasadena California) to be the executors of this my Will, and it is my will that they shall not be required to give bonds for the faithful performance of their duties as such executors.

In Testimony Whereof, I, the said Henry Waterhouse, hereunto subscribe my name and set my seal this twenty fourth day of (24th) March, A. D. 1903.

(Signed)

HENRY WATERHOUSE.

Signed and sealed by the above named Henry Waterhouse, as his last Will in the presence of us, both being present at the same time, and we in his presence, and in the presence of each other, and by his express direction, have hereunto subscribed our names as witnesses the twenty fourth day (24) of March, A. D. 1903.

(Signed)

PERCY M. POND.

(Signed)

ANTONIO Q. MARCALLINO.

Indorsement: Admitted to Probate with Codicil of Apr. 13, 1903, By Gear, Judge. Apr. 4th, 1904. Wm. R. Sims, Clerk.

165 Whereas I, Henry Waterhouse, did make, ordain and publish my last will and testament in due form on 24 day of March A. D. 1903 which will was witnessed by ——— now therefore I do as a codicil to my said last will and testament, and with the direction that this codicil be construed with and as a part of my said last will and testament, give, devise and bequeath all and every share of stock which I now own or which I may own or be entitled to at the time of my death, in Henry Waterhouse Trust Company, Limited, to my son, Albert Waterhouse. In witness whereof I do hereto set my hand and seal this 13th day of April, A. D. 1903.

(Signed)

HENRY WATERHOUSE.

The foregoing instrument was on this 13th day of April A. D. 1903, duly signed and published by Henry Waterhouse as a codicil to his last will and testament in our presence, who at his request do in his presence and in the presence of each other hereto set our hands as witnesses.

(Signed)

EDWIN BENNER.

(Signed)

ANTONIO Q. MARCALLINO.

Indorsement: Last Will and Testament of Henry Waterhouse. Filed February 24, 1904. J. A. Thompson, Clerk. Admitted to Probate by Gear, Judge, April 4th, 1904. Wm. R. Sims, Clerk.

166

Publisher's Affidavit.

TERRITORY OF HAWAII,

Island of Oahu, ss:

Before me, the undersigned, a Notary Public, this day personally came C. G. Bockus, who being first duly sworn, according to law, says that he is the Business Manager of the Evening Bulletin, a Newspaper published at Honolulu, Territory of Hawaii, daily, except Sundays, and that the Publication, of which the annexed is a true copy, was published in said paper on the 5th, 12th, 19th, 26th day of April & 3rd day of May, A. D. 1904, in consecutive order, and that the rate charged therefor is not in excess of the commercial rates charged private individuals, with the usual discounts.

(Signed)

C. G. BOCKUS,

Business Manager, Evening Bulletin.

Subscribed and sworn to before me this 2nd day of May, A. D. 1908.

(Signed)

P. L. PETERS,

Notary Public in and for the First Judicial

Circuit, Oahu, Territory of Hawaii.

[SEAL.]

Notice to Creditors.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Notice is hereby given by the undersigned William Waterhouse and Albert Waterhouse, Executors of the Last Will and Testament of Henry Waterhouse, deceased, to the creditors of and all persons having claims against the said deceased to present their claims, duly authenticated, with the proper vouchers, within six months after the first publication of this notice to said executors at the office of Waterhouse & Waterhouse, 932 Fort Street, Honolulu, Territory of Hawaii, same being the place for the transaction of business of said estate in said Territory.

WILLIAM WATERHOUSE,
ALBERT WATERHOUSE,
*Executors of the Last Will and Testament of
Henry Waterhouse, Deceased.*

Dated at Honolulu, T. H., April 5, 1904.

Smith & Lewis, Attorneys for Executors.

2732—Apr. 5, 12, 19, 26; May 3.

Indorsement: P. 3669. Circuit Court, First Circuit, Territory of Hawaii. In Probate. In the Matter of the Estate of Henry Waterhouse, Deceased. Affidavit of Publication of Notice to Creditors. Filed May 2d, 1908, at 10:30 o'clock a. m. J. A. Thompson, Clerk.

167 That thereafter plaintiff called Henry Smith, who was duly sworn as a witness, and testified that he is, and since the year 1892 has been the Clerk of the Judiciary Department of the Territory of Hawaii, and was such clerk during the month of April 1904; that plaintiff's counsel called the attention of the witness to the order of court dated April 8, 1904, (Plaintiff's Exhibit P) and asked him if the bond in such order required had been filed, to which question the witness replied that no such bond had been filed; and said witness also testified that he issued the execution (Plaintiff's Exhibit Q) in said replevin action on April 15, 1904, and that he had made the minute note thereon. That, upon cross-examination said witness testified that he did not know by whom said execution had been returned to the Clerk's Office; that the endorsement of its having been returned was made by clerk J. A. Thompson; that in issuing said execution he had delivered it to one of plaintiff's attorneys on said April 15th; and that he did not know when, if at all, it came to the hands of the sheriff.

That thereafter plaintiff called Albert Waterhouse, who was duly sworn as a witness and testified that he is one of the executors under the will of the late Henry Waterhouse; that the plaintiff, William W. Bierce, Limited, filed with the executors under the will of Henry Waterhouse two claims against the estate, one on or about September 6th, 1904, and the other on September 30th, 1904; that said witness,

upon being shown a claim dated September 6, 1904, signed William W. Bierce, Limited, by S. H. Derby, testified that it was the first claim referred to by him, whereupon plaintiff offered same in evidence and it was received and read in evidence and marked "Plaintiff's Exhibit CC", same being in words and figures as follows:

168 In the Circuit Court of the First Judicial Circuit.

At Chambers. In Probate.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Creditor's Claim.

William W. Bierce, Limited, a corporation duly organized and existing under the laws of the State of Louisiana hereby presents its claim as hereinafter specified against the estate of the above named decedent Henry Waterhouse as follows:

The Estate of Henry Waterhouse, Deceased, to Wm. W. Bierce, Ltd.,
Dr.

To amount due as surety on redelivery bond in the case of Wm. W. Bierce Ltd. vs. C. J. Hutchins, Trustee...	\$22,000.
Interest on said sum from date of judgment.....	578.
	<hr/> \$22,578.00

The particulars of this claim are briefly as follows:

On July 20th. A. D. 1903 William W. Bierce Ltd. filed in the Circuit Court of the Third Judicial Circuit an action in replevin against one Clinton J. Hutchins Trustee for the recovery of certain property consisting of rails, engines, cars, railroad equipment etc. and upon filing an approved bond were given possession of the property. Said Hutchins then filed a redelivery bond in said court with the decedent Henry Waterhouse and one A. B. Wood as sureties in the words and figures following:

169 Circuit Court, Third Circuit, Territory of Hawaii.

Stamps.

WILLIAM W. BIERCE, LTD., a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Return Bond.

Know all men by these presents: That we Clinton J. Hutchins Trustee, as principal and Henry Waterhouse and Arthur B. Wood

as sureties are held and firmly bound unto William Bierce Company Ltd. its successor or successors and assigns in the sum of Thirty Thousand (30,000) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors herein and administrators jointly and severally by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies and turned over to said plaintiff, and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

Now therefore if the said property and all thereof shall be well and truly delivered the said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1904.

Sg.
Sg.
Sg.

CLINTON J. HUTCHINS, *Trustee.*
HENRY WATERHOUSE, *Surety.*
ARTHUR B. WOOD, *Surety.*

The foregoing Bond is approved as to its sufficiency of sureties.
Dated July 21, 1903.

Sg.

A. M. BROWN,
High Sheriff.

and thereupon said Hutchins resumed possession of said property. The cause was on December 17th, 1903 transferred to the First Circuit and on March 19th 1904 judgment was duly rendered in plaintiff's favor for a return of the property in question or, 170 in case said property was not returned, for the sum of \$22,000 such being the value placed by the court upon the property.

An appeal was taken from said judgment, but pending appeal execution was ordered to issue upon good cause shown and did so issue, but was returned wholly unsatisfied. No delivery of the property in question has ever been made although duly demanded nor has any payment of the said sum of \$22,000 been made, although duly demanded, and William W. Bierce Ltd. claims that it has a just and good claim in the above mentioned sum against the estate of Henry Waterhouse, who was one of the sureties on said bond.

WILLIAM W. BIERCE, LIMITED,
A Creditor.

By Its Attorney in Fact:

(Signed) S. H. DERBY.

HONOLULU, OAHU,
Territory of Hawaii, ss:

S. H. Derby being first duly sworn on oath deposes and says:

That he is the duly authorized and acting attorney in fact for William W. Bierce Limited the above named claimant in this jurisdiction; that said William W. Bierce Limited is a corporation duly organized and existing under the laws of the State of Louisiana, and has no other representative in this jurisdiction except affiant, and the firm of Kinney, McClanahan & Cooper which is its legal representative; that he knows the contents of the above claim and that the same is true of his own knowledge that no payments have been made thereon; that there are no offsets or counter claims in regard to the same, and that the same is now due and payable.

(Signed)

S. H. DERBY.

Subscribed and sworn to before me this 6th day of September, A. D. 1904.

(Signed) GUSSIE H. CLARK.

Notary Public, First Judicial Circuit.

[SEAL.]

Indorsements: Probate No —. At Chambers. In Probate. First Judicial Circuit Territory of Hawaii. In the Matter of the Estate of Henry Waterhouse, deceased. Creditor's Claim. — — —, Judge. Filed — —, 19—. — — —, Clerk. Kinney, McClanahan & Cooper 302-305 Judd Bldg. Honolulu. Attorneys for — — — (Office No. —) No. 1 Claim. Law No. 6023 Plaintiff's Exhibit CC. Filed May 11/08 Job Batchelor, Clerk.

171 That said witness testified that said executors had rejected said claim in writing, and upon being shown a letter dated September 26, 1904, testified that it was the written rejection he referred to, whereupon plaintiff offered said letter in evidence and same was received and read in evidence and marked "Plaintiff's Exhibit DD," same being in words and figures as follows:

172

SEPT. 26TH, 1904.

Messrs. Kinney, McClanahan & Cooper, Honolulu.

GENTLEMEN: Replying to your favor of the 23rd inst., I beg to state that the claim of Wm. W. Bierce Ltd. against the estate of Henry Waterhouse, deed., has been rejected, which said claim is returned herewith.

Yours very truly,

(Signed)

ALBERT WATERHOUSE,
Executor Estate of Henry Waterhouse (Deceased).

Enc.

Indorsements: Plaintiff's Exhibit DD. Law No. 6023 Plaintiff's Exhibit DD. Filed May 11th, 1908 Job Batchelor, Clerk. Plaintiff's Exhibit DD.

173 That said witness testified that the signature to the said letter was his signature, and that the letter was sent to Kinney, Ballou & McClanahan, attorneys for the plaintiff; that said witness, upon being shown plaintiff's claim dated September 30, 1904, testified that it was the second claim referred to by him, whereupon plaintiff offered said claim in evidence and the same was received and read in evidence and marked "Plaintiff's Exhibit EE", same being in words and figures as follows:

174 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

At Chambers. In Probate.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Creditor's Claim.

William W. Bierce Limited, a corporation duly organized and existing under the laws of the State of Louisiana hereby presents its claim as hereinafter specified against the estate of the above named decedent Henry Waterhouse as follows:

The Estate of Henry Waterhouse, Deceased, to Wm. W. Bierce L't'd, Dr.

To amount due as surety on redelivery bond in the case of Wm. W. Bierce Ltd. vs. C. J. Hutchins, Trustee	\$22,000.
Interest on said sum from date of judgment.....	578.
	<hr/>
	\$22,578.00

The particulars of this claim are briefly as follows:

On July 20th, A. D. 1903 William W. Bierce Ltd. filed in the Circuit Court of the Third Judicial Circuit an action in replevin against one Clinton J. Hutchins Trustee for the recovery of certain property consisting of rails, engines, cars, railroad equipment etc. and upon filing an approved bond were given possession of the property. Said Hutchins then filed a redelivery bond in said court with the decedent Henry Waterhouse and one A. B. Wood as sureties, a certified copy of which is hereto attached, and thereupon said Hutchins resumed possession of said property. The cause was on December 17th 1903 transferred to the First Circuit and on March 19th 1904 judgment was duly rendered in plaintiff's favor for a return of the property in question or, in case said property was not returned, for the sum of \$22,000 such being the value placed by the court upon the property. An appeal was taken from said judgment, but pending appeal, execution was ordered to issue upon good cause shown and did issue, but was returned wholly unsatisfied. No delivery of the property in question has ever been made although

duly demanded nor has any payment of the said sum of \$22,000 been made, although duly demanded, and William W. Bierce Ltd. claims that it has a just and good claim in the above mentioned sum against the estate of Henry Waterhouse, who was one of the sureties on said bond.

WILLIAM W. BIERCE, LIMITED, *Creditor.*

By its Attorney in fact:

(Signed) S. H. DERBY.

HONOLULU, OAHU,

Territory of Hawaii, ss:

S. H. Derby being first duly sworn on oath deposes and says:

That he is the duly authorized and acting attorney in fact for William W. Bierce Limited the above named claimant in this jurisdiction; that said William W. Bierce Limited is a corporation duly organized and existing under the laws of the State of Louisiana, and has no other representative in this jurisdiction except affiant, and the firm of Kinney, McClanahan & Cooper, which is its legal representative; that he knows the contents of the above claim and that the same is true of his own knowledge that no payments have been made thereon; that there are no off sets or counter claims in regard to the same, and that the same is now due and payable.

(Signed)

S. H. DERBY.

Subscribed and sworn to before me this 30th day of September, A. D. 1904.

(Signed) GUSSIE H. CLARK,

Notary Public, First Judicial Circuit.

[SEAL.]

176 Circuit Court, Third Circuit, Territory of Hawaii.

(\$1.00 Stamp.)

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

v.

CLINTON J. HUTCHINS, Trustee.

Replevin.

Return Bond.

Know all men by these presents:

That we Clinton J. Hutchins, Trustee as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns in the sum of Thirty Thousand (\$30,000) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, herein and administrators jointly and severally firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his Deputies and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his Deputies;

Now Therefore if the said property and all thereof shall be well and truly delivered to the said plaintiff, if said delivery be
177 adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Sig.)

CLINTON J. HUTCHINS, *Trustee*.

"

HENRY WATERHOUSE, *Surety*.

"

ARTHUR B. WOOD, *Surety*.

The foregoing bond is approved as to its sufficiency of sureties.

(Sig.)

A. M. BROWN,

High Sheriff.

Dated July 21, 1903.

TERRITORY OF HAWAII,
Island of Hawaii, ss:

I hereby certify that the foregoing is a full, true and correct copy of the Original Return Bond, filed in the Circuit Court Third Circuit, in the case of William W. Bierce Limited, a corporation, v. Clinton J. Hutchins, Trustee.

Witness my hand and the Seal of the Circuit Court, Third Circuit Territory of Hawaii, this 30th day of October, A. D. 1904.

(Signed)

GEORGE LUCAS,

[SEAL.]

Clerk First Circuit Court.

Indorsements: Probate No. —. At Chambers. In Probate. First Judicial Circuit Territory of Hawaii. In the Matter of the Estate of Henry Waterhouse, deceased. Creditor's Claim. —, Judge. Filed —, 19—. —, Clerk. Kinney & McClanahan. 302-305 Judd Bldg., Honolulu. Attorneys for —. (Office No. —.) Claim No. 2. Law No. 6023. Plaintiff's Exhibit EE. Filed May 11, 1908. Job Batchelor, Clerk.

178 That said witness also testified that he believed that said second claim had been rejected by said executors; that, upon cross-examination by defendants' counsel, said witness testified that

said second claim had not been rejected by said executors prior to October 12th, 1904; that, upon re-direct examination by plaintiff's counsel, said witness testified that said second claim had been rejected some time after this present suit was filed and had not been acted upon prior thereto, that the witness and his co-executor, William Waterhouse who resided in California, had consulted in regard to it and decided to reject the claim

That thereafter counsel for plaintiff offered and read in evidence the deposition of Columbus Bierce, a witness for plaintiff, theretofore taken pursuant to a commission issued by this Court, in which said witness deposed that, he resides in New Orleans, Louisiana, is Vice-President and a stockholder and director of the corporation William W. Bierce, Limited, and as such vice-president has been in active charge of its business and affairs since its organization in 1899; that he knows what property was involved in the action of replevin tried in the circuit court of the first judicial circuit of the Territory of Hawaii in which William W. Bierce, Limited, was plaintiff, and Clinton J. Hutchins, trustee, was defendant, in which judgment was entered in favor of the plaintiff on March 19, 1904; that said property, and no part thereof, has, since the entry of said judgment, been delivered to the plaintiff; that neither the value of said property, nor any portion thereof has been paid to plaintiff since the entry of said judgment; that the amount of the damages for the detention of said property as awarded in and by said judgment was paid to plaintiff's attorneys in Honolulu in April 1904;

that in response to the cross-interrogatories propounded to
179 said witness, he deposed that he had never been in the

Territory of Hawaii; that the plaintiff corporation has no place of business nor any officer nor agent in said Territory except its attorneys, Kinney, McClanahan and Derby and Kinney, McClanahan & Cooper, and in the fall of 1904, Judge Clinton J. Galbraith became associated with them as counsel for plaintiff and remained such counsel until about the month of April 1905; that the firm of Kinney, McClanahan & Cooper continued to act as attorneys at law for plaintiff till about the middle of November 1905, since which time A. G. M. Robertson, of Honolulu, has been the only representative of plaintiff within the Territory of Hawaii; that the authority of the agents above named was limited to the duty of prosecuting the replevin suit in which the judgment referred to was rendered, and in protecting that judgment, and they were authorized as such attorneys to demand and take delivery of the property in question for and in behalf of William W. Bierce, Limited, or failing so to do, to obtain payment in full for the value thereof as well as damages for the detention thereof and costs of suit awarded by said judgment; that as vice-president of said corporation, in active charge of all its business and affairs, he knows of his own knowledge that said property has not been delivered, nor any portion of it delivered to plaintiff; that neither the value nor any portion thereof — has been paid to plaintiff; that the amount of damages for the detention of said property as awarded by said judgment has been paid, that as such vice-president he has had

charge of and directed all efforts made by said corporation to recover the possession of said property, or the value thereof, and has personally directed the conduct of all the attorneys acting for the company in the prosecution of said litigation; that he has
 180 actively had charge of the books of account of said company, and knows same to be correct and true, and which show no payment to the company on account of the value of said property, and show no part of the property returned to William W. Bierce, Limited; that he knows that continuously since the entering of said judgment to the present time said Clinton J. Hutchins, trustee, has waged an aggressive fight against plaintiff in the courts in endeavoring to have said judgment reversed and nullified.

That thereafter counsel for plaintiff offered and read in evidence the deposition of E. W. Holden, a witness for plaintiff, theretofore taken pursuant to a commission issued by this Court, in which said witness deposed that, he resides in New Orleans, Louisiana, is Secretary and Treasurer, and a stockholder and director in said William W. Bierce, Limited; that he has been such stockholder since the organization of the company in 1899, and has been Secretary and Treasurer thereof since September 1903; that as such officer he has been actively engaged in the management of the business of the company since September 1903; that he knows what property was involved in said replevin action; that no portion thereof has been delivered to the plaintiff since the entry of judgment in said action; that neither the value of said property, nor any part thereof, has, since the entry of said judgment been paid to plaintiff; and that damages for the detention of said property, as awarded by said judgment, amounting to \$1045, have been paid. That in response to cross-interrogatories propounded to said witness he deposed that he has never been in the Territory of Hawaii; that the corporation,

William W. Bierce, Limited, had no place of business or
 181 agents within said Territory during the periods named in plaintiff's complaint other than its attorneys at law residing at Honolulu; that his means of knowledge concerning the matters testified to were his active personal connection with the management of the business of William W. Bierce, Limited, including the efforts which have been constantly made by it to recover the possession of said property or the value thereof in money.

That thereafter the plaintiff offered in evidence the exemplified record of the incorporation of William W. Bierce, Limited, dated July 27, 1903, and the same was received and read in evidence and marked "Plaintiff's Exhibit I I," same being in words and figures as follows:

182 STATE OF LOUISIANA,

Parish of Orleans, City of New Orleans:

Be it known, that on this Second day of December in the year [nineteen hundred and]* One thousand, eight hundred and ninety nine.

[* Words and figures enclosed in brackets erased in copy.]

Before me, Jefferson Charles Wenck, a Notary Public, in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned:

Personally came and appeared, the persons whose names are hereunto subscribed, all above the full age of majority; who severally declared that availing themselves of the provisions of an act of the Legislature of this State, known as Act No. 36 of the session of 1888, as well as of those of the general laws of this State relative to the organization of corporations, they have formed and organized, and by these presents do form themselves into and constitute a quorum for the objects and purposes and under the stipulations and agreements hereinafter set forth and expressed, which they hereby adopt as their charter, to wit:

Article I.

The name and title of this corporation shall be William W. Bierce "Limited." Its domicile shall be in the City of New Orleans, State of Louisiana, and it shall have and enjoy succession under its corporate name for a period of Ninety-nine years from and after the date hereof.

Said corporation shall have power and authority to contract, sue and be sued in its corporate name; to make and use a corporate seal, and the same to break or alter at pleasure; to hold receive, lease, hire, purchase sell and convey, as well as to mortgage and hypothecate under its corporate name, both real and personal property; to borrow and lend money, issue bonds and notes, give and receive securities therefor, with power to sell pledge or otherwise dispose of same; name and appoint such managers, directors, officers, overseers and agents as the interest and convenience of said corporation may require; to make and establish such by-laws, rules and regulations for said corporation as may be necessary and proper, and the same to alter, and amend at pleasure.

Article II.

The objects and purposes for which this corporation is organized, and the nature of the business to be carried on by it, are hereby declared to be—the acquisition of the business, property and good will of the Commercial firm of William W. Bierce, situated in the City of New Orleans and elsewhere, including all the patents now owned by them, or in which they are interested, and to continue and conduct a similar business; and in connection therewith to conduct the business of general contractors and manufacturers and of furnishers of construction material; to act as Manufacturers' agents and representatives, and generally in reference to the foregoing to do such things and engage in such pursuits as may pertain thereto, or enure to the benefit of this corporation.

All citations shall be made upon the President of this corporation, and in his absence, the Vice-President thereof.

Article III.

The capital stock of this corporation is hereby fixed at the sum of three hundred thousand (\$300,000) dollars, divided into and represented by three thousand (3000) shares of the par value of one hundred (\$100) Dollars each, which capital stock may be increased or reduced at a meeting called for said purpose as the law provides. The payment of said stock shall be made in cash at such times, in such amounts and upon such notice as may be prescribed by the Board of Directors, who shall also have power to issue full paid stock in payment of property, either real or personal transferred to this corporation, or for labor done for it, at such times and in such manner as may be determined by the Board of Directors. This corporation shall become a going concern as soon as Five thousand dollars of the capital stock shall have been subscribed for.

Article IV.

All the corporate powers of this corporation shall be vested in a Board of Directors, to be composed of Three persons, each of whom shall be a stockholder of record in his own right, to be elected hereafter on the day herein set forth, except the first, which is hereinafter provided for.

The election of the Board of Directors shall be held on the second Tuesday of January of each year, beginning in the year 1901; which Board shall have power to make all needful rules and by-laws for the government and regulation of the Company and of its officers, agents and employes, and to conduct the same, and to appoint subordinate officers and agents necessary to that end.

The elections shall be held at the office of the Company under the supervision of two Commissioners, to be appointed by the Board of Directors. Ten days' notice of such meeting shall be given by the Secretary in writing to each stockholder, at his last known residence; and the Directors then elected shall serve until their successors are elected and qualified. A majority of the votes cast shall elect, and one vote shall be allowed for each share of stock represented by the holder, in person or by proxy.

Any vacancy occurring in said Board from any cause whatsoever shall be filled by the remaining Directors, and a majority of the Directors shall constitute a quorum for the transaction of business. The Board of Directors shall, at their first meeting in each year, elect out of their number a President, and a Vice-President, and also elect a Secretary-Treasurer, who need not be a Director or stockholder, and from time — appoint such other officers, clerks, overseers and agents as may be deemed necessary for the purpose and business of said corporation, and dismiss the same at pleasure.

The following named persons, to wit: William W. Bierce, Columbus Bierce and Charles F. Pierce, shall be and are hereby constituted for the first Board of Directors, with the said William W. Bierce, as President, Columbus Bierce, as Vice-President and Charles F. Pierce, as Secretary-Treasurer, and who shall hold their offices until the

second Tuesday of January 1901 or until their successors are duly elected and shall have qualified and taken their seats.

Any Director may, in writing, appoint, and at his pleasure revoke, a proxy to act for and represent him in his absence at meetings of the Board.

Article V.

Whenever this corporation is dissolved, either by limitation or from any cause, its affairs shall be liquidated under the supervision of two Liquidating Commissioners to be appointed for that purpose from among the stockholders at an election held for that purpose, after ten days' prior notice by the Secretary in writing to each stockholder, at his last known residence, and upon the assent 186 of a majority of the capital stock of said corporation.

Said Commissioners shall remain in office until after the affairs of said corporation shall have been duly liquidated, and in the event of the death of one of the liquidators, the survivor shall continue to act.

Article VI.

This act of incorporation may be changed, altered or amended, or this corporation may be dissolved with the assent of Three-fourths of the stock represented at a meeting for the purpose, after ten days' written notice to each stockholder directed to his last residence.

Article VII.

No stockholder of this corporation shall ever be held liable or responsible for the contracts or faults thereof, in any further sum than the unpaid balance due to the Company on the shares owned by him, nor shall any mere informality in organization have the effect of rendering this charter null, or of exposing a stockholder to any liability beyond the amount of his stock.

Thus done and passed in my Notarial Office at the City of New Orleans aforesaid, in the presence of Charles J. Herr and Sam Henderson Jr., Competent witnesses of lawful age and residing in this City, who hereunto subscribe their names together with said appearers and me Notary on the day and date set forth in the caption hereof.

Original Signed.

Wm. M. Bierce, Twenty (20) shares.
Columbus Bierce, Twenty (20) shares.
Chas. F. Pierce, Ten (10) shares.

CHAS. J. HERR.
SAM HENDERSON, Jr.

JEFF C. WENCK, *Not. Pub.*

the above and foregoing act of Incorporation of William W. Bierce "Limited" was this day duly recorded in this Office in Book 646 folio 700.

New Orleans, December 22nd, 1899.

(Signed)

[SEAL.]

GEO. GUINAULT,

Dy. R. M.

I, the undersigned Notary do hereby certify that the above and foregoing is a true and correct copy of the original act of "William W. Bierce "Limited" together with the certificate of the Recorder of Mortgages thereunto appended, on file and of record in my Office.

In faith whereof, I hereunto set my hand and seal this 22nd day of July, A. D. 1903.

(Signed)

[SEAL.]

JEFF C. WENCK,

Not. Pub.

Indorsement: New Orleans Dec. 2nd, 1899. Act of Incorporation of William W. Bierce "Limited. Recorded Mortgage Office. Book 646 fo. 700 Jefferson C. Wenck, (Successor to John Bendernagel) Notary Public, 301 & 302 Cora Building, 818 Common Street, New Orleans, La.

188 UNITED STATES OF AMERICA,
State of Louisiana:

Civil District Court for the Parish of Orleans.

I, John St. Paul, Presiding Judge of the Civil District Court for the Parish of Orleans, a Court of Record, having jurisdiction, do hereby certify, That Jefferson C. Wenck is a duly commissioned and qualified Notary Public for the Parish of Orleans, State of Louisiana, resident in the City of New Orleans; that the attestation of said Notary Public to the document hereunto annexed is in due form and that the signature of said Notary Public appended to said attestation is true and genuine.

Given under my hand at the City of New Orleans, on the Twenty-seventh day of July in the year of our Lord, one thousand nine hundred and three (1903) and in the 128th year of the Independence of the United States of America.

(Signed)

JOHN ST. PAUL, *Judge.*

I, Thomas Connell, Clerk of the Civil District Court for Parish of Orleans, do hereby certify that John St. Paul, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of the Civil District Court for the Parish of Orleans, duly appointed and commissioned and qualified as such, and that said attestation is in due form of law.

Witness my hand and the seal of said Court, this Twenty-seventh (27) day of July 1903.

[SEAL.]

(Signed)

7—508

T. CONNELL, *Clerk.*

Indorsements: Civil District Court Jun. 29 1903 Thomas
 189 Connell, Clerk. Paid 1.00. L. 5782 Exhibit "AA" for
 Identification. Wm. W. Bierce, L't'd. v. C. J. Hutchins,
 Trustee. Filed March 8th, 1904 by Mr. McClanahan. P. D. Kellett,
 Jr. Clerk. Law No. 6023 Plaintiff's Exhibit II. Filed May 12,
 1908 Job Batchelor, Clerk.

190 That said J. A. Thompson, being recalled as a witness by
 plaintiff, testified that he had computed the interest on the
 value of the property as assessed in the judgment of March 19, 1904,
 in said replevin action, and also on the judgment for costs rendered
 in said action on September 27, 1907, by the Supreme Court of the
 Territory of Hawaii; that the total amount of interest on \$22,000,
 from April 15, 1904 to date, May 11, 1908, at the rate of six per
 cent per annum is \$5371.65; that the judgment for costs amounted
 to \$748.57, and the interest thereon from September 27, 1907, at the
 rate of eight per cent, is \$36.52; the total, principal and interest
 being 28,156.74.

That thereafter, plaintiff called as a witness, F. B. McStocker,
 who, being duly sworn, testified that he resides in Honolulu; that
 he is the treasurer of the Kona Development Company, Limited;
 that he had and produced a deed from Clinton J. Hutchins, trustee,
 to himself, which plaintiff offered in evidence, and same was received
 and read in evidence, and designated "Plaintiff's Exhibit III," same
 being in words and figures as follows:

191 "Know all men by these presents that I, Clinton J. Hutch-
 ins, acting both individually and as trustee, of Honolulu,
 Territory of Hawaii, in consideration of the sum of ten dollars, to
 me paid by Francis B. McStocker, of said Honolulu, the receipt
 whereof is hereby acknowledged, and in further consideration of
 the undertaking by said Francis B. McStocker to organize a corpora-
 tion to take over certain lands, leases and property now owned by
 the Kailua Sugar Co., a California corporation, and by myself, said
 property being situate in the district of North Kona, Island of
 Hawaii, and being part of the property conveyed to me by F. L.
 Dortch, receiver of the Kona Sugar Co. Ltd., by deed dated June
 13th, 1903, I do hereby give, grant, bargain sell, convey, assign, set
 over and deliver unto the said Francis B. McStocker all of the fol-
 lowing lands, leases and leaseholds therein described, personal prop-
 erty roads and franchises, viz:

"One. Lease from Queen Kapiolani to A. Fernandez and Frank
 Gouveia, dated September 14th, 1892, for fifteen years, of the lands
 of Waiaha I and Kahului II, situate at North Kona, Island of
 Hawaii, and being recorded in the Registry of Deeds at Honolulu
 in Book 144 on page 269.

"Two. That certain lease from said Kapiolani to J. Coerper of
 lands in the ahupuaas of Waiaha I and Kahului II, dated April
 13th, 1895, for thirteen years with the privilege of extension for
 seventeen years more, and recorded in said Registry of Deeds in
 Book 156 on pages 29 and 30.

"Three. That certain confirmation by the Kapiolani Estate Ltd., of said last named lease, dated January 31st, 1901.

"Four. All of that certain sugar mills, buildings, machinery, equipment, shops, tools, implements and appurtenances on, upon, about, or connected with or incidental to, the sugar manufacturing plant lately belonging to the Kona Suga Co. Ltd. and sold to me as aforesaid by said F. L. Dortch, receiver as aforesaid.

"Five. All other lands, leases and leaseholds, personal property, rights, easements, privileges and appurtenances conveyed to me or intended so to be by the said F. L. Dortch, receiver as aforesaid, by the said deed aforesaid, and not heretofore assigned by me to C. J. Falk or heretofore sold or assigned by me to J. R. Sloan by deed dated February the first, 1904.

"To have and to hold the said described property, together with all the rights, easements, privileges and appurtenances thereunto or to any part thereof belonging, unto the said Francis B. McStocker, his heirs, executors, administrators and assigns, to their sole use and benefit and behoof forever.

"And I, the said Clinton J. Hutchins, both individually and as trustee, do hereby, for myself and my representatives and assigns, covenant with the said Francis B. McStocker, his heirs, executors, administrators and assigns, that I will forthwith cancel and cause to be cancelled by the Kailua Sugar Co. that certain agency agreement between the Kailua Sugar Co. and C. J. Hutchins and that certain planting and grinding agreement between the said Kailua Sugar Co. and Clinton J. Hutchins, both of said agreements being dated February the 14th 1904; that I am lawfully seized in fee of said property, other than said leases and said leaseholds; that I have good right to sell, convey, assign and deliver all of said described property as aforesaid; that the same are free from all incumbrances and that I am and my heirs, executors, administrators and assigns, warrant and defend the said property and each and every part thereof unto the said Francis B. McStocker, his heirs executors, administrators and assigns, against the claims and demands of all persons.

"In Witness Whereof I have hereunto set my hand and seal this 7th day of November, A. D. 1905.

CLINTON J. HUTCHINS,

Trustee.
CLINTON J. HUTCHINS."

194 That thereafter plaintiff called as a witness George C. Kopa, who, being duly sworn, testified that he is a clerk in the registry office, Oahu; that he had brought with him from the records of said office, Volume 249, and, upon turning to page 369 of said Volume, found record of a deed from F. L. Dortch to Clinton J. Hutchins, trustee; that plaintiff offered said deed in evidence, and same was received and read in evidence and designated as "Plaintiff Exhibit JJ," same being in words and figures as follows:

195 Stamped \$52.

That this indenture, made this thirteenth day of June, 1903, by and between F. L. Dortch, Receiver Kona Sugar Company, Limited, the party of the one part, and Clinton J. Hutchins, Trustee, of Honolulu, T. H. the party of the other part.

Witnesseth, That Whereas, by an order issued in the matter of "M. W. McChesney & Sons vs. Kona Sugar Company, Limited, et al.," pending in the Third Circuit Court of the Territory of Hawaii, by Hon. W. S. Edings, Judge of said Court, the said F. L. Dortch, Receiver as aforesaid, was directed to sell at public auction to the highest bidder, all and singular the property and effects of the said defendant corporation, the Kona Sugar Company, Limited, and

Whereas, in accordance with said order and direction the said Receiver did offer the said property of the Kona Sugar Company, Ltd. at such public auction at 12 o'clock noon on the 9th day of May, 1903, at the front door of the Court House at Kailua, Hawaii, such being the time and place named in said order for said sale, and

Whereas, the said Clinton J. Hutchins offered the highest and best bid for said property at said sale, to wit, the sum of \$12,250.00 and

Whereas, by an order and decree made and entered by the said Hon. W. S. Edings on the first day of June, 1903, the said sale and bid were confirmed, and the said Receiver ordered and directed to execute and deliver to said purchaser any and all instruments in writing necessary to effectually convey to said purchaser the said property and effects of the said Kona Sugar Company, Ltd.,

Now Therefore, I, F. L. Dortch, Receiver of the Kona Sugar Company, Limited, by virtue of the authority and direction in said order contained, and for and in consideration of the said sum of

196 Twelve Thousand Two Hundred and Fifty Dollars (\$12,250.00) to me in hand paid, the receipt of which is hereby acknowledged and as Receiver of said Company, do by these presents, give, grant, bargain, sell, convey, assign and set over unto the said purchaser, the said Clinton J. Hutchins, Trustee, his successors and assigns, all the right, title and interest of the said Kona Sugar Company, Limited, in and to all and singular the goods, chattels, effects and property, real, personal and mixed of the said Company, that is to say, all of the lands, tenements and hereditaments, all easements, railroad railroad equipment, locomotives, flat cars, cane cars, sugar mill and equipment, cane conveyors, buildings, implements, wagons, vehicles, growing crops, live-stock, choses in action, franchise and all rights and privileges of said company, and the good will of the same, conveying hereby all and every right, title and interest which the said Company may have in and to every property and effects, whether the same be mentioned hereinbefore or not.

To have and to hold The said and all of the personal and fee simple property unto the said Clinton J. Hutchins, Trustee, his successors and assigns forever, and the said and all and every of

the leasehold and other interests of the said Company for and during the terms of years, remaining yet to run and unexpired thereon, subject nevertheless to the covenants and agreements in said leases contained on the part of said Company to be kept and performed.

In witness whereof, I have hereunto set my hand and seal the day and year first above written.

F. L. DORTCH,
Receiver Kona Sugar Co., L'd.

TERRITORY OF HAWAII,
Third Circuit, ss:

On this 13th day of June, 1903 appeared before me F. L. Dortch, personally known to me to be the Receiver of the Kona
197 Sugar Company, Limited, and to be the person described in, and who executed the foregoing instrument who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein set forth.

GUY F. MAYDWELL, [SEAL.]
Notary Public, Third Circuit.

Recorded & Compared this 17th day of July, A. D. 1903, at 9:48 o'clock A. M.

THOS. G. THRUM,
Registrar of Conveyances.

Indorsement: Deed. F. L. Dortch, Receiver Kona Sugar Company, Limited, To Clinton J. Hutchins, Trustee. Dated June 13th, 1908. Recorded Liber 249 Page 369. Copy. Copy of deed received in evidence, William W. Bierce, Limited vs. William Waterhouse, et al, as Exhibited J. J. O. K. A. G. M. Robertson, Plaintiff's Attorney.

198 That thereafter plaintiff called as a witness J. M. McChesney, who, being duly sworn, testified that he is a merchant and resides in Honolulu; that he resided in Honolulu in the year 1901; that, upon being shown a letter dated March 13, 1901, he stated that the signature thereto is his own signature as president of the Kona Sugar Company, Limited; that he was president of said company at that time; that he was present when the instrument was signed by the other party; that plaintiff offered said letter in evidence, and same was received and read in evidence, being words and figures as follows:

Copy.

PL'FF's EXH. "D."

HONOLULU, H. T., *Mar.* 13, 1901.

Exhibit "B." R. C. S., Com'r.

Kona Sugar Company, Limited, Honolulu, H. I.

GENTLEMEN: In pursuance of the verbal arrangement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company Limited and William W. Bierce Limited as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company Limited Feb. 22, 1900:

We will take in settlement of this contract the sum of \$10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of \$37,044.53, in favor of William W. Bierce, Ltd., payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent ($7\frac{1}{2}\%$) per annum and secured by First Mortgage Bonds of the Kona Sugar Company Limited of par Value equal to the note, said bonds being portion of a duly authorized issue not exceeding \$200,000. This offer is conditioned upon its acceptance by you payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us, before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting.

(Endorsed on the back:) J. M. McChesney.

Ex. "B," pp. 2. R. C. S., Com'r.

K. S. Co. #2.

delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Very truly yours,

(Signed)

W. W. BIERCE, LTD.,
By H. T. GILBERT.

The above terms are accepted this March 13, 1901.

THE KONA SUGAR CO., LTD.,

By its President,

[SEAL.] (Signed) J. M. McCHESNEY.

By its Treasurer,

(Signed) F. W. McCHESNEY.

Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy-six (76) \$500-Bonds of the Kona Sugar Co. numbered from 1 to 76 both inclusive.

(Signed)

W. W. BIERCE, LTD.,
By H. T. GILBERT.

201 That said witness also testified that he believed that the property mentioned in said document on March 13, 1901, was in Honolulu; that he saw said property on the wharf at Honolulu at about that time; that after the execution of said instrument said property was shipped to the Kona Plantation on the Island of Hawaii; that the Kona Sugar Company used said property on its plantation; and that he last saw said property about a year later on the plantation of said Kona Sugar Company. That upon cross-examination said witness testified that at the time the document was signed, Mr. Gilbert knew that the property was to go to the Kona plantation; that in the purchase of said property he acted for the Kona Sugar Company; that at the time the purchase was made one Frank Davies represented William W. Bierce, Limited; that he (the witness) told Mr. Davies that the railroad was to be laid on said plantation; that he also told Mr. Gilbert where said railroad material was to be used; and that Mr. Gilbert visited the plantation subsequent to the time when the railroad had been laid in the plantation and was in operation there. That upon re-direct examination said witness testified that said Davies and Gilbert were only temporarily in the Territory of Hawaii; that said Davies made only one visit to said Territory and said Gilbert two or three such visits; that said Gilbert visited the said plantation in the fall of 1901.

That thereafter plaintiff asked leave of court to amend its complaint by striking out from the first and seventh lines on the fifth page of said complaint the words "together with interest thereon from the 19th day of March 1904," and also by substituting the figures \$28,156.74 for \$22,000. in said lines, and the court allowed said amendments to be made accordingly.

That plaintiff then rested its case.

202 That the foregoing includes all the evidence offered by either of the parties on the trial of said cause in anywise relating to the plaintiff's amendments of the averments of the value of the property in question in the pleadings in said replevin action.

That upon the close of all the evidence, both parties having rested, the defendants moved the court to direct a verdict for the defendants on the following grounds:

"First. The sureties, and particularly the sureties represented by William Waterhouse and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, and Mr. Waterhouse, particularly applying to Mr. Henry Waterhouse in his lifetime, having executed a redelivery bond conditioned on the affidavit of plaintiff in the replevin action, and the complaint of plaintiff setting forth the actual value of the property sought to be replevined at \$15,000, and the fact that the complaint in said replevin action was thereafter amended to show, first the actual value

of \$20,000, and, second, said complaint was thereafter again amended in said action to show a value for \$22,000, and the judgment in said action thereafter rendered for \$22,000, the surety was thereby released by said amendments under the circumstances.

"Second. The cause of action alleged in the complaint in the replevin action at the time of the execution and delivery of the redelivery bond was by subsequent events changed and judgment was rendered on the amended cause of action, the sureties thereby released.

"Third. The property sought to be replevined had not been seized by the sheriff according to the statute at the time
203 of the delivery of the redelivery bond, and the sureties consequently not liable under the bond.

"Fourth. The judgment of May 6th, 1905, by the supreme court of the Territory of Hawaii in the replevin action of Bierce against C. J. Hutchins, trustee, released the defendant sureties in this action.

"Fifth. If such judgment did not release the sureties, then such judgment at least makes the commencement of this action on the bond premature.

"Sixth. Or at least shows that no proof has been introduced by plaintiff's testimony showing breach of conditions of bond by defendant Hutchins, trustee.

"Seventh. This action on the bond cannot be maintained as no claim has been presented to or suit brought against the executors under the will and of the estate of Henry Waterhouse, deceased, according to the statute relative to claims against the estates of decedents.

"Eighth. This action on the bond is prematurely brought against the executors under the will and of the estate of Henry Waterhouse, deceased.

"Ninth. This action was prematurely brought against all parties defendant.

"Tenth. The sureties are released by change of venue from the third circuit to the first circuit court of the Territory of Hawaii without the consent of the sureties in the replevin action of Bierce against Hutchins, trustee.

"Eleventh. The sureties are released by waiver of a jury trial by plaintiff in the replevin action of Bierce, Ltd., against Hutchins, trustee.

"Twelfth. The surety represented by the executors under
204 the will and of the estate of Henry Waterhouse, deceased, is released by the discontinuance of this case as to C. J. Hutchins, trustee, and A. B. Wood.

"Thirteenth. That the evidence shows the sureties were released by the acts of C. J. Hutchins, trustee, and the plaintiff, its agents and attorneys in relation to the property for which the return or redelivery bond was given."

That the court denied said motion and defendants duly excepted to the ruling.

That thereafter on the 22nd day of May, 1908, the jury returned a verdict for the plaintiff which said verdict was in words and figures as follows:

In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1908.

Dock. 26/60.

Law. 6023.

WM. W. BIERCE, LTD.,

v.

WM. WATERHOUSE and ALBERT WATERHOUSE, Executors, under the Will and of the Estate of Henry Waterhouse, Deceased.

Verdict.

We, the Jury in the above entitled cause find for the plaintiff and against the defendants Wm. Waterhouse and Albert Waterhouse as executors under the will and of the Estate of Henry Waterhouse deceased for the sum of \$22,000.00 with interest thereon at the rate of 6% per annum from April 15th 1904, also for the sum of \$748.57 with interest thereon at the rate of 8% per annum from September 27th 1907, the aggregate sum of the principal and interest being \$28,156.74.

(Sig.)

J. F. SOPER, *Foreman.*

Honolulu, T. H., May 22nd, 1908.

Endorsed: L. 6023. Circuit Court, First Circuit, Territory of Hawaii. William W. Bierce, Ltd., v. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased. Verdict. Filed May 22nd, 1908, 9:46 P. M. Job Batchelor, Clerk.

That thereupon, defendants, in the presence of the jury, excepted to said verdict as being contrary to the law and the evidence, and against the weight of the evidence, and gave notice of a motion for a new trial.

That thereafter, on the 26th day of May, 1908, defendants moved the court for judgment *non obstante veredicto*, which said motion was in words and figures as follows:

In the Circuit Court of the First Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, Limited, a Corporation, Plaintiff,

vs.

WM. WATERHOUSE and ALBERT WATERHOUSE, Executors, under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Motion for Judgment Non Obstante Verdicto.

Now come the above named defendants, and move that judgment be entered in favor of the defendants and against the plaintiff, notwithstanding the verdict of the jury, on the following grounds:

1. That the complaint does not show any cause of action against these defendants.

2. That the action was prematurely brought and that no valid claim had been presented to the defendants and rejected by them, and that the evidence shows that a reasonable time had not elapsed after the alleged presentation of the claim before this action was brought in which to approve or reject said claim.

3. Upon all the grounds set out in plea in abatement filed by the defendants in this action.

4. That the evidence shows that there was no consideration given for the bond in suit, and that it is not binding on these defendants.

5. That at the time when this action was brought the judgment entered against the principal defendant, Clinton J. Hutchins, Trustee, was stayed by the proceedings taken on the bill of exceptions to the Supreme Court of Hawaii, and that as against the defendants in this action the Circuit Court of the First Circuit had no authority to order any further bond or security on appeal to be given, or to order said judgment to be enforced or execution to issue thereon, since the act under which said orders were made went into force on August 1, 1903, subsequently to bringing of the replevin action of Bierce v. Hutchins, Trustee, and the giving of the re-delivery bond on which this suit was brought.

6. Because said judgment in the replevin action of Bierce v. Hutchins, rendered in the Circuit Court of the First Circuit was reversed by the Supreme Court of Hawaii on the 28th day of January, 1905, and also by the order of May 6, 1905, and that at the time of the giving of the re-delivery bond upon which this suit was brought said judgment of the Supreme Court of Hawaii was final and conclusive as to these defendants, and that the subsequent passage of the act of Congress March 3, 1905, amending the Organic Act did not and could not affect the liability of these defendants and the sureties upon said bond, the said bond being entered into with reference to existing provisions of law and the same becoming a part of the contract; and the subsequent reversal of the decision of the Supreme Court of Hawaii and the entry of the order of said Supreme Court setting aside its former

decision and overruling the exception does not affect the sureties on said bond or the liability of the defendants in this action, whose liability was terminated by the said proceedings in the Supreme Court of Hawaii, January 28, 1905, and May 6, 1905.

6a. That the contract of the sureties on the re-delivery bond was altered, changed and *or* extended by the appeal to the Supreme Court of the United States under and by virtue of the amendment of March 3, 1905, of the Organic Act by the plaintiff in the said replevin action of Bierce vs. Hutchins, Trustee.

7. Because the affidavit in replevin and the complaint based on the affidavits setting out the sworn value of the property in suit, upon which affidavit and complaint by law the re-delivery bond is based, which bond recites that the property is "of the value of \$15,000, as stated in the affidavit filed herein," is and are judicial admissions made by the plaintiff in this action upon which the sureties in signing said re-delivery bond had a right to rely, and as to the sureties, the defendants in this action the plaintiff is estopped to claim that the value of said property is more than

208 \$15,000; and the subsequent proceedings by which the allegations of said complaint were amended to increase the alleged value first to \$20,000 and then to \$22,000, and the recovery of judgment for \$22,000 as to the value of said property, operated to release the sureties from the obligation of said re-delivery bond and are not binding against said sureties, the defendants in this action.

8. That the amendment to the complaint in said action, by which the cause of action is alleged to arise wholly out of the contract of March 13, 1901, and not out of the contract of February 21, 1901, constituted a change of the cause of action upon which said re-delivery bond was given and released the sureties from their obligation under any judgment rendered in said action.

9. Because the uncontradicted evidence shows an offer to return the property in accordance with said bond, and a tender of the same, which discharged the sureties upon said bond.

10. That, whether a valid tender of said property were made or not, the offer to return, duly made, was so far accepted by the plaintiff that it operated as a discharge of the sureties upon the said bond.

11. That the so-called option to the Kapiolani Estate, Limited, and the notice to it given by the plaintiff April 19, 1904, subsequent to said offer to return, by means of which the plaintiff disabled itself for thirty days to remove the property from its *situs*, coupled with its notice to the defendant in the suit not to use or disturb the property in the meantime, and the fact that the uncontradicted evidence in this case shows that no action was taken by the plaintiff until after the expiration of said thirty days, viz., until the 20th day of May, 1904, and that the said defendant, Clinton J. Hutchins, Trustee, did not disturb or use said property during

209 said time, in law discharged the sureties upon said bond from further liability.

12. That after the Kapiolani Estate, Limited, on April 14, 1904, had accepted from plaintiff a thirty-day option to purchase

the property covered by the replevin bond, and while said option was outstanding and in force and effect; the said plaintiff had caused execution to issue in the replevin action and to be delivered into its possession on April 15, 1904, it then and there became the duty of the said plaintiff, acting in good faith to the surety on the replevin bond, to cause said execution to be immediately placed in the hands of the sheriff and executed; that said execution was not so immediately executed, but on the contrary was held, and secreted in the hands of plaintiff's attorneys at law and in fact was not placed in the hands of the deputy sheriff for the purpose of execution until May 21 or May 23, 1904, and after said option had expired; that said delay was prejudicial to the rights of the surety, and as a matter of law released the surety.

13. That the original action was still pending at the time when this suit was brought.

14. That there is no evidence upon which a verdict could be rendered for any sum against these defendants.

Dated, Honolulu, May 26, A. D. 1908.

(Sig.)

SMITH & LEWIS,
CASTLE & WITHINGTON.

Attorneys for Defendants.

Endorsed: Original No. 6023. Circuit Court, First Circuit, Territory of Hawaii. 26/60. William W. Bierce, Limited, a corporation, plaintiff, vs. William Waterhouse and Albert Waterhouse, Executors etc., Defendants. Motion for Judgment Non Obstante Verdicto. Filed May 26th, 1908, 9:8 A. M. Job Batchelor, Clerk. Castle & Withington, Attorneys for Defendants. Motion denied, May 25/08. J. B.

That said motion was overruled by the court, and defendants duly excepted to the ruling.

210 That thereafter, on May 29, 1908, defendants moved the court for a new trial of said action, which said motion was in words and figures as follows:

In the Circuit Court of the First Circuit, Territory of Hawaii, 1908 Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Motion for New Trial.

The defendants, William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse,

deceased, come and move that the verdict in said action and judgment entered therein be set aside, and for a new trial, upon the following grounds:

1. That the verdict and judgment are against the law.
2. That the verdict and judgment are against the evidence and the weight of the evidence.
3. Errors of law occurring during the trial, in the admission and rejection of evidence, and excepted to by these defendants.
4. Refusal to give instructions to the jury requested by these defendants, which refusal was excepted to by these defendants.
- 211 5. Errors in giving instructions to the jury requested by the plaintiff, the giving of which was excepted to by these defendants.

Without waiving other errors, the defendants specify, as particular errors referred to under subdivisions 3, 4 and 5, the following:

I.

Errors in the Admission and Rejection of Evidence.

(a) The refusal to admit in evidence copy of the surrender from the Kapiolani Estate, Limited, to William W. Bierce, Limited, of the property in question, and the evidence of the witness John F. Colburn offered in connection with the same.

(b) The exclusion, both by rejection and striking out, of the evidence of the witness Henry E. Cooper in regard to a change of policy on the part of the plaintiff in reference to securing possession of the property in question.

(c) The exclusion of the evidence of instructions from the plaintiff to its attorneys-in-fact and attorneys-in-law, Kinney, McClanahan and Cooper, in reference to obtaining possession of the property, asked on cross-examination of said witness when offered as a witness to show effort to obtain such possession.

(d) The refusal of the court to allow said witness, on cross-examination, to disclose what were the instructions of his principal under which he was acting at the time of his trip to Kona, which he had testified in chief he had made to get possession of the property and in reference to a change of policy on the part of said plaintiff in reference to said matter.

212 (e) The refusal to admit in evidence the letter of Kinney, McClanahan and Cooper dated April 19, 1904, or to allow the witness to refresh his recollection from said letter.

(f) The refusal to allow the witness to testify on cross-examination that, as agent of the plaintiff, he dealt with the Kapiolani Estate, Limited, upon the idea that a surrender of the property had been executed by them.

(g) The admission in evidence of the trust deed from Clinton J. Hutchins, Trustee, to the Henry Waterhouse Trust Company, Limited, (Plaintiff's Exhibit "MM"), and the refusal to strike out the same.

(h) The admission in evidence of the notice from John Paris (Plaintiff's Exhibit "NN").

(i) The admission in evidence of the deeds from Hutchins to McStocker (Plaintiff's Exhibit "GG") and McStocker to Kona Development (Plaintiff's Exhibit "HH"), long after the transactions in question, and the evidence of other dealings with said property long subsequent to the offer to return the property relied on by these defendants.

(j) The refusal to allow the witness Shingle to testify as to the relations between Clinton J. Hutchins, Trustee, and one Linder, shown at a subsequent time to have been using the property in question.

II.

Error in refusing to give defendants' Instructions Nos. 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 17, 18, 19, 20, 21, 22 and 24, and each of them.

III.

The giving of plaintiff's requests for instructions Nos. 2 (as modified), 2a, 3, 4, 5, 6, 6a, 7, 8, 9, 10, 12, 13c, 13d, 14, 15, 16, 17, 18, 18a, 19, 20, 21, 22, 22a, 23, 24, 25, 26, and 29, and each of them.

213 6. That the complaint does not show any cause of action against these defendants.

7. That the action was prematurely brought and that no valid claim had been presented to the defendants and rejected by them, and that the evidence shows that a reasonable time had not elapsed after the alleged presentation of the claim before this action was brought in which to approve or reject said claim.

8. Upon all the grounds set out in plea in abatement filed by the defendants in this action.

9. That the evidence shows that there was no consideration given for the bond in suit, and that it is not binding on these defendants.

10. That at the time when this action was brought the judgment entered against the principal defendant, Clinton J. Hutchins, Trustee, was stayed by the proceedings taken on the bill of exceptions to the Supreme Court of Hawaii, and that as against the defendants in this action the Circuit Court of the First Circuit had no authority to order any further bond or security on appeal to be given, or to order said judgment to be enforced or execution to issue thereon, since the act under which said orders were made went into force on August 1, 1903, subsequently to bringing of the replevin action of Bierce v. Hutchins, Trustee, and the giving of the re-delivery bond on which this suit was brought.

11. Because said judgment in the replevin action of Bierce v. Hutchins rendered in the Circuit Court of the First Circuit was reversed by the Supreme Court of Hawaii on the 28th day of January, 1905, and also by the order of May 6, 1905, and that at the time of the giving of the re-delivery bond upon which this suit

214 was brought said judgment of the Supreme Court of Hawaii
the subsequent passage of the act of Congress March 3, 1905,
amending the Organic Act did not and could not affect the liability
of these defendants and the sureties upon said bond, the said bond
being entered into with reference to existing provisions of law and
the same becoming a part of the contract; and the subsequent reversal
of the decision of the Supreme Court of Hawaii and the entry
of the order of said Supreme Court setting aside its former decision
and overruling the exception does not affect the sureties on said bond
or the liability of the defendants in this action, whose liability was
terminated by the said proceedings in the Supreme Court of Hawaii
January 28, 1905, and May 6, 1905.

12. That the contract of the sureties on the redelivery bond was
altered, changed or extended by the appeal to the Supreme Court of
the United States under and by virtue of the amendment of March
3, 1905, of the Organic Act, by the plaintiff in the said replevin
action *v. Bierce v. Hutchins, Trustee.*

13. Because the affidavit in replevin and the complaint based on
the affidavit setting out the sworn value of the property in suit,
upon which affidavit and complaint by law the re-delivery bond is
based, which bond recites that the property is "of the value of
\$15,000 as stated in the affidavit filed herein," is and are judicial
admissions made by the plaintiff in this action, upon which the
sureties in signing said redelivery bond had a right to rely, and as
to the sureties, the defendants in this action the plaintiff is estopped
to claim that the value of said property is more than \$15,000, and
the subsequent proceedings by which the allegations of said com-
plaint were amended to increase the alleged value first to \$20,000
and then to \$22,000, and the recovery of judgment for
215 \$22,000 as the value of said property, operated to release the
sureties from the obligation of said re-delivery bond and are
not binding against said sureties, the defendants in this action.

14. That the amendment to the complaint in said action, by
which the cause of action is alleged to arise wholly out of the con-
tract of March 13, 1901, and not out of the contract of February 21,
-901, constituted a change of the cause of action upon which said
re-delivery bond was given and released the sureties from their
obligation under any judgment rendered in said action.

15. Because the uncontradicted evidence shows an offer to return
the property in accordance with said bond, and a tender of the same,
which discharged the sureties upon said bond.

16. That, whether a valid tender of said property were made or
not, the offer to return, duly made, was so far accepted by the
plaintiff that it operated as a discharge of the sureties upon the said
bond.

17. That the so-called option to the Kapiolani Estate, Limited,
and the notice to it given by the plaintiff April 19, 1904, subsequent
to said offer to return, by means of which the plaintiff disabled
itself for thirty days to remove the property from its *situs*, coupled
with its notice to the defendant in the suit not to use or disturb the

property in the meantime, and the fact that the uncontradicted evidence in this case shows that no action was taken by the plaintiff until after the expiration of said thirty days, viz., until the 20th day of May, 1904, and that the said defendant, Clinton J. Hutchins, Trustee, did not disturb or use said property during said time, in law discharged the sureties upon said bond from further liability.

18. That after the Kapiolani Estate, Limited, on April 14, 1904, had accepted from plaintiff a thirty-day option to purchase the property covered by the replevin bond, and while said option was outstanding and in force and effect, the said plaintiff had caused execution to issue in the replevin action and to be delivered into its possession on April 15, 1904, it then and there became the duty of the said plaintiff, acting in good faith to be immediately placed in the hands of the sheriff and executed; that said execution was not so immediately executed, but on the contrary was held and secreted in the hands of plaintiff's attorneys at law and in fact and was not placed in the hands of the deputy sheriff for the purpose of execution until May 21, or May 23, 1904, and after said option had expired; that said delay was prejudicial to the rights of the surety, and as a matter of law released the surety.

19. That the original action was still pending at the time when this suit was brought.

20. That there is no evidence upon which a verdict could be rendered for any sum against these defendants.

Dated, Honolulu, May 29, A. D. 1908.

(S'g'd)

SMITH & LEWIS,
CASTLE & WITHINGTON,
Attorneys for Defendants, Executors
Waterhouse Est.

Endorsed: Law. 6023. Circuit Court, First Circuit, Territory of Hawaii. 1908 Term. William W. Bierce, Limited, a Corporation, Plaintiff, vs. Clinton J. Hutchins, Trustee, Arthur B. Wood, and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, Defendants. Motion for New Trial. Filed May 29, 1908, at 5:10 o'clock P. M. J. A. Thompson, Clerk. Smith & Lewis, Attorneys at Law. Honolulu, T. H. Judd Building.

217 That said motion was overruled by the court, and defendants duly excepted to the ruling.

That thereupon, judgment was duly entered in this Court upon said verdict, said judgment being in words and figures as follows:

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term, A. D. 1908.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Judgment.

This action by complaint as amended, claiming Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages, came to the September Term A. D. 1904, and thence by continuance to the present Term, when the parties appeared, and were at issue to the jury.

Said cause having been heard and committed to the jury, they find for the plaintiff to recover Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages.

218 Therefore it is ordered and adjudged by the Court that the plaintiff, William W. Bierce, Limited, do have and recover from the defendants, William Waterhouse and Albert Waterhouse as Executors under the Will and of the Estate of Henry Waterhouse, deceased, Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages, together with its attorneys' fees or commissions taxed at Seven Hundred Eleven and 43/100 Dollars (\$711.42) and its costs taxed at \$81.45 to be paid in due course of administration.

By the Court:

(S'g'd)

[SEAL.]

JOB BATCHELOR,

Clerk.

Entered this 29th day of May, 1908, as of the January Term, 1908.

Endorsed: Law. 6023. Circuit Court, First Judicial Circuit. William W. Bierce, Limited, vs. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased. Judgment. Filed May 29th, 1908, at 3:45 o'clock P. M. L. P. Scott, Clerk.

That thereafter, defendants filed and perfected a bill of exceptions in said cause to the Supreme Court of the Territory of Hawaii, wherein, among other exceptions they included their exceptions to the rulings of this Court upon their said motion for a directed verdict, their said motion for judgment *non obstante veredicto*, and their said motion for a new trial. That upon the hearing of defendants' said bill of exceptions said Supreme Court sustained the exception of defendants to the overruling of defendants' motion

for judgment *non obstante veredicto*, in so far as the same was based upon defendants' claim of discharge from liability by reason of the said amendments of the averments of the value of the property in question as set forth in plaintiff's complaint as amended in said action of replevin. That thereafter, said Supreme Court, having heard the arguments of counsel for the respective parties upon said exceptions, on the 12th day of April, 1909, handed down and filed its opinion in said cause accompanied by the dissenting opinion of Mr. Justice Wilder, one of the Associate Justices of said Supreme Court, which said opinion and dissenting opinion are in words and figures as follows:

220 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

WILLIAM W. BIERCE, LIMITED,

v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Exceptions from Circuit Court, First Circuit.

Argued March 8, 9, 1909. Decided April 12, 1909.

Hartwell, C. J., Wilder, and Ballou, JJ.

Principal and surety—discharge of surety by variation of risk.

The plaintiff in a replevin action having alleged in its declaration and replevin bond the actual value of the property replevied to be \$15,000, and the defendant in that action having given a return bond in double the amount reciting the valuation as alleged, subsequent amendments whereby the plaintiff increased the valuation to \$22,000 and recovered alternative judgment for that amount are a variation of the risk of the sureties on the return bond and discharge them from liability.

221

Opinion of the Court by Ballou, J.

This is a bill of exceptions to review a judgment against the defendants, as executors of the will of Henry Waterhouse, upon a return bond in a replevin action executed by Henry Waterhouse as surety.

The replevin action was brought by the plaintiff against Clinton J. Hutchins, trustee, on July 20, 1903, and was for the recovery of certain railway material which had been used by the Kona Sugar Co., Ltd., the property of which corporation had been bought by Hutchins at a receiver's sale. Plaintiff alleged in its declaration that the actual value of the property was \$15,000 and filed its affidavit in conformity with R. L. Sec. 2102, then Civil Laws, Sec. 1695, alleging, in conformity with the statutory requirement of "the

actual value of the property" that the actual value of the property was \$15,000 and tendered its bond in double that amount. Hutchins thereupon elected to retain possession of the property under R. L. Sec. 2112 by giving the return bond upon which the present action is founded which reads as follows:

Circuit Court, Third Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

v.

CLINTON J. HUTCHINS, Trustee.

(\$1.00 stamp.)

Replevin.

Return Bond.

Know all Men by These Presents:

That we Clinton J. Hutchins, Trustee, as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns in the sum of Thirty Thousand (30,000) Dollars for the payment of which well and truly to be made, we bind ourselves, our successors herein and administrators jointly and severally firmly by these presents.

222 The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover, from him certain property specifically set forth in the bill of complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

Now therefore if the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In Witness Whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

CLINTON J. HUTCHINS, *Trustee.*
HENRY WATERHOUSE, *Surety.*
ARTHUR B. WOOD, *Surety.*

The foregoing bond is approved as to its sufficiency of sureties.
Dated July 21, 1903.

A. M. BROWN,
High Sheriff.

(Endorsed:) Filed, August 1st, 1903, 7 o'clock A. M. J. P. Curts, Clerk.

Before going to trial plaintiff amended his declaration by increasing the allegation of the actual value of the property from \$15,000 to \$20,000, which amendment was allowed by the court March 7, 1904, and at the close of his case by again increasing the value to \$22,000, which amendment was allowed March 19, 1904. The case was tried jury waived, and plaintiff recovered judgment for the return of the property with \$1045 damages and \$50.50 costs, with an alternative judgment in case of failure to return for \$22,000, the adjudged value of the property, with the same damages and costs. Certain exceptions brought by the defendant Hutchins were sustained by this court, the decision being rendered January 28, 1905. *Bierce v. Hutchins*, 16 Haw. 418. At that time this was the court of final appeal in the case, no federal question being involved. On March 3, 1905, an act of congress was passed allowing appeals from this court in cases involving over \$5000. (33 Stat. 1035, c. 1465, sec. 3.) After a petition for rehearing decided April 29, 223 1905, (*Bierce v. Hutchins*, 16 Haw. 717), the plaintiff stated that it would have no further evidence to present if the case were remanded and asked that a judgment remanding with direction to enter judgment for the defendants, be entered in this court which, in the absence of objection from the defendant in that action, was done. An appeal from this judgment was allowed by the Supreme Court of the United States and the judgment reversed. *Bierce v. Hutchins*, 205 U. S. 340. This court then held that the defendant in that action was entitled to a hearing upon exceptions not passed upon at the first hearing (*Bierce v. Hutchins*, 18 Haw. 374) but after hearing overruled the exceptions. (*Bierce v. Hutchins*, 18 Haw. 511.) An appeal from this decision was dismissed (*Hutchins v. Bierce*, 211 U. S. —, December 14 1908.)

Meanwhile Henry Waterhouse had died February 20, 1904, and the present defendants qualified as his executors. After the trial of the replevin action the plaintiff caused execution to be issued April 15, 1904, notwithstanding the pendency of the defendant's exceptions. The statute allowing this procedure upon good cause shown (R. L. Sec. 1861) had been passed April 22, 1903, before the execution of the bond now sued upon, but went into effect August 1, 1903, the day the bond was filed and a few days after its execution. The execution having been returned unsatisfied, the present action, joining Hutchins, Wood and the executors of Henry Waterhouse as defendants, was filed on October 11, 1904, at which time the exceptions in the replevin action were pending in the Supreme Court of the Territory. A demurrer was overruled and the defendants answered. Before the case was brought to trial the Supreme

Court of the Territory sustained the exceptions in the replevin action whereupon the defendants in the action on the bond pressed for trial, but continuances were granted by the court until after the first decision of the Supreme Court of the United States and the subsequent overruling of the remaining exceptions by this court. Upon a sug-

224 ggestion of misjoinder plaintiff discontinued as to Hutchins and Wood and proceeded solely against the Waterhouse executors. The case was tried before a Jury in May, 1908, the principal issue of fact being whether or not there had been an actual redelivery of the property in April or May, 1904, after the judgment of the circuit court. The jury found for the plaintiff for the sum of \$22,000 with interest at six per cent. from April 15, 1904, also for the sum of \$748.57 with interest at eight per cent. from September 27, 1907, the aggregate of principal and interest being \$28,156.74. The smaller item was composed of costs in the United States Supreme Court and of costs in the Supreme Court of the Territory, the damages in the replevin action having been paid.

The bill of exceptions brings up 127 exceptions, most of which were argued and relied upon. Many of these, however, relate to the same points, the principal defenses of the sureties being that they were discharged by the amendment to the local statute allowing execution to issue in certain cases pending exceptions; that they were discharged by the amendment to the Organic Act allowing an appeal to the Supreme Court of the United States in cases involving over \$5000; that they were discharged by plaintiff's successive amendments to its declaration whereby the alleged value of the property was increased from \$15,000 to \$22,000; that the suit was prematurely brought against these executors; and that the law laid down by the trial court as the obligor's duty to return the property after judgment was inapplicable and misleading in view of certain correspondence in which Hutchins purported to deliver the property with certain conditions, which delivery was accepted by the plaintiff upon other conditions.

We find it necessary to consider only those exceptions which go to the amendments of value made by the plaintiff. This defense of the sureties is based upon the fact that the plaintiff in its replevin affidavit swore that the actual value of the property was \$15,000, which fact is recited in the condition of the redelivery bond, the
225 plaintiff's declaration containing the same allegation. After the execution of the bond the plaintiff amended the allegation in his declaration first to \$20,000 and afterwards to \$22,000. The prayer of the declaration was for judgment for the return of the property, with damages for detention and costs, but according to the practice in replevin, by which an alternative cash judgment for the value of the property was rendered in default of the return of the property, the amendments amounted to an increase of the ad damnum, and the sureties claim that this is an alteration of their contract, and an increase in the risk assumed by which they are discharged from liability.

The question thus raised is one of considerable difficulty, and one on which the decisions are conflicting. The contract of the

surety may be with reference to another contract, usually called the principal contract, between the principal and a third party, as a bond to secure the performance of a building contract; or on the other hand it may be with reference merely to an undertaking of the principal, as a bond that he will appear in court or that he will pay a judgment which may be rendered against him. The rule that any "alteration in the contract" releases the surety is frequently stated, but it is not always clear whether the contract referred to is the principal contract or the bond of the surety, or whether in the case of a surety for an undertaking the word contract is not used to mean either existing circumstances or the terms upon which performance may be demanded. In the case of a surety upon a contract any alteration in the principal contract releases the surety, the commonest case being an agreement between the principal and the third party modifying the terms of the principal contract. *United States v. Freel*, 186 U. S. 309. Another kind of "alteration of contract" is an alteration made on the face of the bond itself (*Martin v. Thomas*, 24 How. 315; *Smith v. United States*, 2 Wall. 219) or upon the face of an instrument referred to in the bond. *Miller v. Stewart*, 9 Wheat, 680. In the latter case, the instrument appointing a deputy collector was altered by the addition of a ninth township to the eight specified. The court lays 226 some stress upon the alteration being on the face of the instrument, but the case has been widely cited and applied where there was no such technical alteration, but where a modification of the duties of the principal or of the terms of the undertaking guaranteed by the sureties has been held to be an alteration of the contract. Thus in *Reese v. United States*, 9 Wall. 13, the bond was for the appearance of a defendant at designated term of court in San Francisco "and at any subsequent term to be thereafter held in that city." A stipulation between the district attorney and defendant's counsel, approved by the court, that the case should be brought to trial only after final decree in certain civil actions and provided they were against defendant was held to discharge the sureties, the court saying:

"It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharged them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change,

or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

Here there was no alteration in the sureties' contract, and there was no contract, in the ordinary sense of that word, between the defendant and the district attorney which was subsequently altered. There was a modification, by proper authority, of the terms of the principal's undertaking to appear, which was held to be an entire discharge of the contract of the sureties. We dwell on this distinction because the use of the word contract in this connection appears to be the source of some confusion. In *United States v. Backland*, 33 Fed. 156, for example, the "contract" held to be changed had been fulfilled. A more accurate statement of the effect of the

227 decisions of the Supreme Court is as follows:

"They have decided that the surety is discharged not merely by payment of the debt or a release of the principal, but by any material change in the relations between the principal and the party to whom he owes a debt or duty; and that the surety cannot be held in such case by showing that the change was not injurious to him. For he had a right to judge for himself of the circumstances under which he was willing to be liable, and to stand upon the very terms of his contract." 2 Parsons Contracts 17.

Upon the precise question of the effect of an increase of the ad damnum upon a bond previously executed there is a conflict of authority. The majority of the cases hold the sureties are not discharged. Thus in *New Haven Bank v. Miles*, 5 Conn. 587, where the defendant had been arrested in a civil action and the bail bond was conditioned only for his appearance in court, an increase from \$600 to \$1200 was held not to discharge the sureties, the court holding that they assumed the risk of all amendments allowed by statute. In *Carr & Hobson v. Sterling*, 114 N. Y. 558, another case of arrest on civil process, the undertaking provided that the defendant "shall at all times render himself amenable to any mandate which may be issued to enforce final judgment against him in the action." The ad damnum was increased from \$7000 to over \$13,000 and after judgment by default the sheriff returned "defendant not found." The surety was held liable, but there is no distinction taken between the rights of the surety and those of the principal. In these two cases there was no undertaking in the bond to pay the amount of the judgment recovered.

In *Hare v. Marsh*, 61 Wis. 435, an amendment of the ad damnum in the justice's court on an action of tort to an amount in the circuit court beyond the justice's jurisdiction was held not to release the surety on the bond given to stay execution pending the appeal, the undertaking of the bond being to pay any judgment remaining unsatisfied. The court says: "The undertaking presupposes the exercise of such authorized judicial powers as should be called into action in the case. The contract was impliedly, if not

228 expressly, with reference to such exercise of judicial power." Exactly the opposite result was reached in *Evers v. Sager*, 28 Mich. 47, although there is a dictum to the effect that the sureties would have been bound had the amendment been within the power

of the court irrespective of stipulation. In Massachusetts a statute (Pub. Sts. c. 167, sec. 42) is construed as binding sureties in the event of amendments, provided it appears that the amended cause of action is the same as that relied on by the plaintiff when the action was commenced, however the same may be misdescribed. If the sureties are notified of the proposed amendment they are bound by its allowance, subject to exception or appeal, if not notified they are still liable if it appears that the adjudication was correct, and the court may go outside the record and receive oral testimony as to what was the cause of action intended to be relied on when the suit was commenced. *Driscoll v. Holt*, 170 Mass. 262. The issue under this statute is therefore merely whether a new cause of action has been introduced and decisions upon one side or the other (*Prince v. Clark*, 127 Mass. 599; *Townsend Bank v. Jones*, 151 Mass. 454) are not helpful. In Maine an increase of the ad damnum upon the same demand discharges the sureties upon a bond given with reference to the action (*Langley v. Adams*, 40 Me. 125), and the same principle was applied where the creditor, without amendment, took judgment in excess of his ad damnum. *Ruggles v. Berry*, 76 Me. 262.

The only principle that can be deduced from the cases holding the sureties liable is that sureties on judicial bonds, as distinguished from sureties on private contracts or undertakings, contract with knowledge of the power of the court, under statute or otherwise, to make amendments, and must be presumed to take the risk of such amendments even if their liability is thereby increased. If this principle is sound it would be of much wider application than cases of the increase of ad damnum, yet outside that field it is seldom recognized and the distinction generally denied. Brandt, Suretyship, Sec. 511; *Reese v. United States*, quoted above. One of the most common amendments under statutes is the substitution of new parties, and yet this is generally held to discharge the sureties, *Richards v. Storer*, 114 Mass. 101; *Tucker v. White*, 5 Allen 322. Contra, *Jamieson v. Capron*, 95 Pa. St. 15. The correction of an error in the description of the property replevied as the substitution of "north-east" for "south-east" in the quarter section from which logs were cut is well within the power of amendment, but discharges the sureties. *Bolton v. Nitz*, 88 Mich. 354. The surety on a judgment for alimony or on a temporary injunction knows that it may be modified by the court, yet he is discharged by such modification. *Sage v. Strong*, 40 Wis. 575; *Tyler Mining Co. v. Last Chance Mining Co.*, 90 Fed. 15. Sometimes, of course, the language of the bond, by fair construction, shows that subsequent increase of risk has been assumed as where the condition that a distiller "shall in all respects faithfully comply with all the provisions of law," etc., has been held to signify an intention to stipulate that the principal should comply with duties subsequently imposed by law. *United States v. Powell*, 14 Wall. 493.

The rule of strictissimi juris has been said to be a stringent one, and liable at times to work a practical injustice. With regard to subsequent amendments in judicial proceedings we should hesitate

to apply it except when it resulted in a variation of risk which was plainly outside the contract of the sureties. Even an increase of the ad damnum might not have that effect, as when the cause of action is certain drafts with interest thereon, and the ad damnum is increased to cover interest subsequently accruing. *Townsend Bank v. Jones*, 151 Mass. 454. Here the surety was fairly apprised of his risk at the outset and the amendment was to satisfy legal formality. The case at bar is quite different. It is impossible to read the bond without inferring that the value therein recited, fixed by the plaintiff itself, was part of the material inducement upon which the sureties assumed the risk. The responsibility for "such sum as may for any cause be recovered against the defendant" evidently refers to recovery upon the action recited. *The Oregon*, 158 U. S. 186, 206. The risk in this case was to be responsible for the return of property, of a specified value, or in default thereof for the payment of a judgment for its value, together with damages, interest and costs. The penal sum of the bond, \$30,000, was the limit of the risk, not the risk itself. The subsequent amendments were not the exercise of a judicial power for which neither party was responsible, but the voluntary act of the obligee, the allowance by the court being formal and largely controlled by statute. R. L. Sec. 1738. By these amendments, in this case made after the death of the surety whose estate is now sought to be charged, the plaintiff increased the risk of the sureties nearly fifty per cent., and actually obtained a judgment for \$22,000 with damages and costs. We are of the opinion that this increase of liability was outside the contract of the sureties and that they are discharged.

The exception to the overruling of defendants' motion for judgment non obstante veredicto, in so far as it is based upon their discharge from liability by the plaintiff's amendments of value, is sustained. The remaining grounds of the motion and the remaining exceptions not necessarily involved are not passed upon.

A. G. M. Robertson for plaintiff.

A. Lewis, Jr., D. L. Withington and John W. Cathcart (Smith & Lewis, Castle & Withington on the briefs) for defendants.

(Signed)

ALFRED S. HARTWELL.

(Signed)

SIDNEY BALLOU.

The surety in this case agreed to pay "such sum as may, for any cause, be recovered against" Hutchins. The limit of that obligation was stated in the bond to be \$30,000. Plaintiff having recovered against Hutchins the sum of \$22,000, the surety is bound by his obligation to pay that sum. The conclusion of the majority of the court that the surety is discharged is based on the assumption that the surety's risk was increased by the amendments in the replevin action raising the value of the property from \$15,000 to \$22,000. That assumption very properly requires that the risk or obligation of the surety should be stated differently from what it is in the bond under the statute. If the obligation of the surety was

as stated by the majority, then the conclusion they reach logically follows. If, on the other hand, it was as stated in the bond and in the statute, that conclusion does not and cannot logically follow. To be sure the obligation and the limit of that obligation are different things. The obligation is to pay such sum as may be recovered, while the limit provides that in no event can that sum, so far as the surety is concerned, be more than \$30,000.

From the cases referred to by the majority it appears that the courts in Massachusetts, Connecticut, New York, Wisconsin, Pennsylvania and, possibly, Michigan, to which should be added Ohio, Indiana and Vermont, (*Jaynes v. Platt*, 47 Oh. St. 262; *Sherry v. Bank*, 6 Ind. 397; *Wright v. Brownell*, 3 Vt. 436.) would hold that in this case the surety was not discharged, while in Maine it would be held the other way. The two cases of *Sage v. Strong*, 40 Wis. 575 and *Tyler Mining Co. v. Last Chance Mining Co.*, 90 Fed. 15, are easily distinguishable from the case at bar. In the first one the surety obligated himself to see that a judgment which had already been rendered would be paid, while in the second case the obligation of the surety was to pay any damages caused by an injunction which had already issued. The surety in each case knew when he signed the bond that the judgment or injunction could be
 232 modified by the court, but he never agreed to be bound by a modification any more than he agreed to be bound in case a different judgment or injunction was thereafter entered. That is something entirely different from the case where a surety knows when he executes the bond that he is to be liable if at all to pay a judgment to be rendered in the future and, it must be remembered, in the usual course of procedure, which would include amendments of the kind made.

The majority opinion being in my opinion contrary to both principle and the great weight of the decided cases, I am compelled to dissent therefrom.

(Signed)

A. A. WILDER.

Indorsement: No. 383. Supreme Court Territory of Hawaii. October Term 1908. William W. Bierce, Limited, v. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased. Opinion. Filed April 12, 1909, at 10 o'clock A. M. J. A. Thompson, Clerk.

233 That defendants' plea in abatement which is referred to in defendants' said motion for judgment *non obstante veredicto* is in words and figures as follows:

234 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January (1905) Term.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Plea in Abatement.

Now come William Waterhouse and Albert Waterhouse, Executors of the Will of Henry Waterhouse, deceased; defendants in the above entitled action, and pray judgment of the plaintiff's bill of complaint filed in said action, and that the same be dismissed because they say that that certain Action in Replevin, commenced in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, wherein William W. Bierce, Limited, is plaintiff, and Clinton J. Hutchins, Trustee, is defendant, to recover from said defendant certain property in the complaint in said action mentioned, and wherein the return bond on which said plaintiff seeks to recover in this action is alleged to have been given, was on or about the 21st day of March 1902, appealed to the Supreme Court of the Territory of Hawaii, and that said appeal has been perfected and has not been dismissed, and is at the present time pending and undetermined before said Supreme Court.

That the obligation of said return bond alleged to have been given and made by said defendant Clinton J. Hutchins, Trustee, as principal, and Henry Waterhouse (whose executors 235 said William Waterhouse and Albert Waterhouse are defendants herein,) and Arthur B. Wood, also defendant herein, are sureties, is only that if the said property and all thereof shall be well and truly delivered the said plaintiff, if said delivery be adjudged by said court, and pay such sums as may be recovered against said defendant Clinton J. Hutchins, Trustee, by judgment in said action, then this obligation to be void, otherwise to remain in full force and effect; that the said William W. Bierce, Limited, plaintiff in this action is not entitled to maintain this action on said return bond as alleged in said complaint in this action or at all, pending the aforesaid appeal to said Supreme Court, and that said action on said bond cannot be maintained until final judgment in that certain action wherein said return bond is alleged to have been given and made; and this the defendants are ready to verify.

Wherefore, the said defendants pray judgment of this Honorable Court whether they should be compelled to make any other or further answer to said complaint and that these defendants further pray that they be hence dismissed with their costs.

WILLIAM WATERHOUSE, AND
ALBERT WATERHOUSE,

*Executors under the Will and of the Estate
of Henry Waterhouse, Deceased, Defendants.*

(Signed) By SMITH & LEWIS,
Their Attorneys.

TERRITORY OF HAWAII,
Island of Oahu, ss:

Albert Waterhouse, being first duly sworn, deposes and says that he is one of the Executors of the last Will of Henry Waterhouse, deceased, and one of the defendants in the above entitled action; that he has read the foregoing Plea to the Complaint of William W. Bierce, Limited, Plaintiff in the above entitled action, 236 and that all the matters and things alleged in said Plea are true.

(Signed)

ALBERT WATERHOUSE.

Subscribed and sworn to before me this 11th day of November 1904.

(Signed)
 [SEAL.]

WM. J. FORBES,
*Notary Public, First Judicial
 Circuit, Territory of Hawaii.*

Indorsement: L. 6023. Circuit Court, First Judicial Circuit, Territory of Hawaii, January (1905) Term. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Trustee, Arthur B. Wood; and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased. Defendants. Plea in Abatement of William Waterhouse and Albert Waterhouse, Executors. Filed November 11, 1904, at 3:49 o'clock P. M. J. A. Thompson, Clerk. Service admitted. Kenney, McClanahan & Cooper, Att'ys for [Def's.]* Plaintiff. Smith & Lewis Attorneys at Law Judd Building Honolulu, T. H.

237 That thereupon, plaintiff duly applied to said Supreme Court for a rehearing of said cause, which said application was denied by said Supreme Court on the 4th day of May, 1909.

That on the 5th day of May 1909, said Supreme Court made and filed its decision in said cause, same being in words and figures as follows:

238 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
 v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Defendants.

Decision on Exceptions.

In the above entitled cause the exception to the overruling of defendants' motion for judgment *non obstante veredicto*, in so far as it is based upon the discharge from liability by the plaintiff's

[* Words and figures enclosed in brackets erased in copy.]

amendments of value, is sustained, pursuant to the opinion of the Court filed herein on the 12th day of April, A. D. 1909

J. A. T., Clerk. May
June 18/09. Dated at Honolulu, [April]* 5, A. D. 1909.

By the Court:
(Signed)

J. A. THOMPSON, *Clerk.*

Indorsement: No. 383 Supreme Court Territory of Hawaii William W. Bierce, Ltd., Plaintiff, vs. William Waterhouse and Albert Waterhouse, Executors, Defendants. Decision on Exceptions. Filed May 5, 1909, at 2:45 o'clock P. M. J. A. Thompson, Clerk. Castle & Withington Attorneys for Defendants.

239 That thereupon, on said 5th day of May, 1909, said Supreme Court granted and issued its mandate in said cause to the Circuit Court of the First Circuit aforesaid, which said mandate is in words and figures as follows:

240 Supreme
J. A. T. Clerk. In the [Circuit]* Court of the [First Circuit]*
June 18/09. Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Defendants.

Notice of Decision on Exceptions.

To the Hon. John T. De Bolt, First Judge of the First Circuit Court, Territory of Hawaii:

Please Take Notice that in the above entitled cause the Supreme Court has filed its decision therein, to wit:

"Decision on Exceptions."

"In the above entitled cause the exception to the overruling of defendants' motion for judgment *non obstante veredicto* in so far as it is based upon the discharge from liability by the plaintiff's amendments of value, is sustained, pursuant to the opinion of the court filed herein on the 12th day of April, A. D. 1909."

May
J. A. T., Clerk. Dated at Honolulu, [April]* 5, A. D. 1909.
June 18/09. By the Court:

[SEAL.] (Signed) J. A. THOMPSON,
Clerk.

Indorsement: No. 383. Supreme Court, Territory of Hawaii. William W. Bierce, Ltd., Plaintiff, vs. William Waterhouse and Albert Waterhouse, Executors, Defendants. Notice of Decision on Exceptions. Filed May 5, 1909, at 2:46 o'clock P. M. J. A. Thompson, Clerk. Castle & Withington, Attorneys for Defendants.

241 That thereafter on the 27th day of May, 1909, plaintiff filed its motion in this Court that judgment be entered herein pursuant to said mandate of said Supreme Court. That on said 27th day of May 1909, said defendants filed herein their bill of costs and thereupon their costs were duly allowed and taxed by the Court at the sum of \$1097.22, and judgment was entered herein in words and figures as follows:

242 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term, A. D. 1909.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

WILLIAM WATERHOUSE AND ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

This cause coming on regularly to be heard upon the application of the plaintiff to dispose of the same in conformity to the mandate or remittitur of the Supreme Court of the Territory of Hawaii filed herein, and it appearing to the court therefrom and from the opinion of said Supreme Court in this cause, which opinion was handed down on the 12th day of April, A. D. 1909, and is now presented to the court, that the defendants' exception to the ruling of this Court overruling the defendants' motion for judgment non obstante veredicto in this cause, in so far as it is based upon their claimed discharge from liability by the plaintiff's amendments of the averments of the value of the property in question as contained in the complaint as amended in the action of replevin in question, is sustained by said Supreme Court; and that judgment ought to be given for the defendants notwithstanding the verdict found by the jury herein.

Therefore, it is ordered and adjudged that the judgment entered herein on said verdict on the 29th day of May, A. D. 1908 in favor of the plaintiff and against the defendants, be and the same
243 is hereby vacated and set aside, and it is further ordered and adjudged that the plaintiff take nothing by its writ, and that the defendants recover of and from the plaintiff their costs, taxed at the sum of \$1097.22 Dollars.

By the Court:

(Signed)

[SEAL.]

JOB BATCHELOR,

Clerk.

J. B. Entered this 29th day of May, A. D. 1909, [as of the 29th May 1908.]*

Indorsement: Law 6023. Circuit Court, First Circuit, Territory of Hawaii. 1909 Term. William W. Bierce, Limited, vs. William Waterhouse, et al. Exs. Etc. Motion to Enter Judgment. Filed May 27th, 1909, at 10:35 A. M. L. P. Scott, Clerk. A. G. M. Robertson, Att'y for Plaintiff.

244 That plaintiff by its attorney then and there duly excepted to said judgment, and the entry thereof, and filed its exception thereto and same was duly allowed, said exception, and the allowance thereof being in words and figures as follows:

245 In the Circuit Court of the First Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Exception.

Plaintiff excepts to the judgment entered in the above entitled cause this 29th day of May 1909, on the ground that the same is contrary to law.

Dated Honolulu, May 29, 1909.

WILLIAM W. BIERCE,
LIMITED,

(Signed) By its Attorney, A. G. M. ROBERTSON.

The above exception is hereby allowed.

Dated May 29, 1909.

(Signed)

J. T. DE BOLT,

First Judge.

Indorsement: Law 6023. Circuit Court, First Circuit. William W. Bierce, Limited, vs. William Waterhouse and Albert Waterhouse, executors, Estate Henry Waterhouse, deceased. Exception to Judgment. Filed May 29th, 1909, 10:50 A. M. Job Batchelor, Clerk.

246 That thereafter, on the 1st day of June 1909, the court duly made and entered herein an order allowing plaintiff thirty days from said date in which to file, present and perfect its bill of exceptions herein, as follows:

247 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term, A. D. 1909.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Order.

The plaintiff herein is hereby allowed until thirty days from date in which to file, present and perfect its bill of exceptions herein.

Dated, Honolulu, June 1st, 1909.

(Signed)

J. T. DE BOLT,
First Judge.

Consent as to time given.

(Sig.) SMITH & LEWIS,
Some of the Attorneys for Defendants.

Indorsement: L. 6023. Circuit Court, First Circuit, Territory of Hawaii. January Term 1909. William W. Bierce, Limited, vs. William Waterhouse, et al. Order. Filed June 2, 1909, at 2 o'clock P. M. J. A. Thompson, Clerk.

248 Certified copies of plaintiff's original complaint and plaintiff's amended complaint in the above entitled cause, also defendants' demurrer to said amended complaint and defendants' answer thereto are hereby referred to and made part of this Bill of Exceptions as fully and completely as though set forth herein.

Dated, June 21, 1909.

WILLIAM W. BIERCE,
LIMITED,

(Signed) By its Attorney, A. G. M. ROBERTSON.

The foregoing Bill of Exceptions having been duly filed and presented, and being conformable to the truth is hereby approved and allowed this 28th day of June, 1909.

(Signed)

J. T. DE BOLT,
First Judge, Circuit Court, First Circuit.

Service of a copy of the foregoing bill of exceptions acknowledged this 21st day of June, 1909.

(Signed)

SMITH & LEWIS,
Of Counsel for Defendants.

Presented for allowance this 21st day of June, 1909.

(Signed)

J. T. DE BOLT,
First Judge.

Indorsement: Circuit Court, First Circuit. Law 6023. William W. Bierce, Ltd. vs. William Waterhouse and Albert Waterhouse, executors, etc. Plaintiff's Bill of Exceptions. Presented and Filed June 21, 1909, at 2:40 o'clock P. M. L. P. Scott, Clerk. A. G. M. Robertson, Att'y for Plaintiff. S. C. No. 434.

249 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January (1905) Term.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

(\$2. Stamps.)

Complaint.

To the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Circuit:

Comes now the said plaintiff, William W. Bierce, Limited, and for cause of action against the said defendants, says:

That the plaintiff is now and at all the times hereinafter mentioned was a corporation duly organized under the laws of the State of Louisiana, and duly qualified to bring and maintain suit in this Territory; that the defendant Clinton J. Hutchins, Trustee is a resident of Honolulu, Island of Oahu, Territory of Hawaii; that the defendant Arthur B. Wood is also a resident of said Honolulu, and that the defendants, William Waterhouse and Albert Waterhouse, are the duly qualified and acting Executors under the will and of the estate of Henry Waterhouse, deceased, late of Honolulu, and are residing in said Honolulu.

That heretofore, to wit, on the 21st day of July, 1903, said Clinton J. Hutchins, Trustee, as principal, with said Henry Waterhouse and said Arthur B. Wood as sureties, executed his certain writing obligatory whereby the said principal and the said sureties, their successors and administrators, jointly and severally, became bound unto the William W. Bierce Limited, plaintiff herein, its successor or successors and assigns, in the sum of Thirty thousand dollars, the condition of said writing obligatory being that whereas the said William W. Bierce Limited, had begun in the Circuit Court of the Third Circuit of the Territory of Hawaii a replevin action against Clinton J. Hutchins, Trustee, to

recover from him certain property specifically set forth in the Complaint filed in said action, of the alleged value of Fifteen thousand dollars, and requested that said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his Deputies and turned over to said plaintiff, and whereas said defendant, being desirous of having said property returned and had required the return thereof from said High Sheriff and his deputies; Therefore if the said property and all thereof should be well and truly delivered to the said plaintiff, if such delivery should be adjudged, and payment to the said plaintiff should be well and truly made of such sum as might, for any cause be recovered against the defendant, then said obligation should be null and void, otherwise to be and remain in full force and effect: That a copy of said writing obligatory is hereto attached, marked "Exhibit "A" and made a part hereof.

That on or about December 17th, 1903, the said cause between plaintiff and the said Clinton J. Hutchins, Trustee, was by stipulation in writing and order of court duly transferred from the Circuit Court of the Third Circuit to the Circuit Court of the First Circuit of the Territory of Hawaii, and on March 19th, 1904, judgment was duly rendered against said Clinton J. Hutchins,

251 Trustee, and in favor of the plaintiff for the return of the aforesaid property, or in case said property was not returned, for the sum of Twenty-two thousand dollars, which was the value of said property as found by the Court; that afterwards, on good cause being shown by the plaintiff, execution was duly issued on said judgment, and was duly returned by the proper officer wholly unsatisfied, whereupon the obligation of said writing obligatory was violated and forfeited and a right of action thereon accrued in plaintiff's favor.

That the aforesaid Henry Waterhouse, surety on said writing obligatory, died at Honolulu on or about the 20th day of February, 1904, leaving a will in which he appointed the defendants William Waterhouse and Albert Waterhouse as his Executors and that said will was admitted to probate by the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit and said executors duly appointed by said Judge on or about the 4th day of April, 1904.

And the said plaintiff further says that on or about the 6th day of September 1904 and within the time required by law, the said plaintiff duly presented its claim against the Estate of Henry Waterhouse, deceased, to the defendants William Waterhouse and Albert Waterhouse, and that said claim was on or about the 26th day of September 1904 rejected by said defendants; that on or about the 30th day of September 1904, plaintiff again presented its claim against said Estate of Henry Waterhouse, deceased, to said defendants, said claim being so presented the second time in order that certain formal inaccuracies in the statement of the first claim might be corrected, but that up to the present time said defendants have failed, neglected and refused to allow or reject the said claim.

And plaintiff further says that six months have elapsed since

the probate of the Will of the aforesaid Henry Waterhouse and the appointment of said defendants as his executors, and that plaintiff is now entitled to sue said defendants under the laws of this Territory.

That no part of the judgment of Twenty-two thousand Dollars obtained by the plaintiff against the said Clinton J. Hutchins, Trustee, has been paid by said Clinton J. Hutchins, Trustee, or his sureties said Henry Waterhouse and said Arthur B. Wood or by any person and that no part of the property involved in 252 said replevin suit and ordered returned by said judgment has been returned to this plaintiff.

That the plaintiff has been damaged in the premises in the sum of Twenty-two thousand dollars, together with interest thereon from the 19th day of March, 1904.

Wherefore plaintiff prays the process of this court to summon the said defendants to appear and answer this complaint at the January 1905 Term of this Honorable Court, and that plaintiff may have judgment against defendants for the sum of \$22,000 together with interest thereon from March 19th, 1904, its costs and attorney's commissions.

WILLIAM W. BIERCE,
LIMITED,

(Signed) By its Attorneys, KINNEY, McCLANAHAN
& COOPER.

C. A. GALBRAITH,
Of Counsel.

HONOLULU, OAHU,
Territory of Hawaii, ss:

S. H. Derby being first duly sworn on oath deposes and says:

That he is the duly authorized and acting attorney in fact of the above named plaintiff William W. Bierce Limited in this jurisdiction; that said William W. Bierce Limited, is a corporation duly organized and existing under the laws of the State of Louisiana and has no other representative than affiant in this jurisdiction except its attorneys at law; that he has read the foregoing complaint and knows the contents thereof and that the matters and things therein alleged and set forth are true.

(Signed)

S. H. DERBY.

Subscribed and sworn to before me this 11th day of October, A. D. 1904.

(Signed)
[SEAL.]

GUSSIE H. CLARK,
Notary Public, First Judicial Circuit.

Circuit Court, Third Circuit, Territory of Hawaii.

Stamps.

WILLIAM W. BIERCE, L'T'D, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Return Bond.

Know all men by these presents: That we Clinton J. Hutchins, Trustee, as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bound unto William W. Bierce Company Ltd. its successor or successors and assigns in the sum of Thirty Thousand (30,000) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors herein and administrators jointly and severally by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies and turned over to said plaintiff, and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

Now therefore if the said property and all thereof shall be well and truly delivered the said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Sg.)
(Sg.)
(Sg.)

CLINTON J. HUTCHINS, *Trustee.*
HENRY WATERHOUSE, *Surety.*
ARTHUR B. WOOD, *Surety.*

The foregoing Bond is approved as to its sufficiency of sureties.
Dated July 21, 1903.

(Sg.)

A. M. BROWN,
High Sheriff.

Indorsement: Law No. —. Circuit Court First Circuit Territory of Hawaii. William W. Bierce, Ltd., Plaintiff vs. Clinton J. Hutchins, Trustee, et al. Defendants. Complaint. — — —, Judge. Rec'd. \$37. Filed October 12, 1904, at 9:50 a. m. J. A. Thompson, Clerk. Kinney, McClanahan & Cooper 302-305 Judd Bldg. Honolulu Attorneys for — — — (Office No. —).

254 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January (1905) Term.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse, and Albert Waterhouse, Executors Under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Demurrer.

Now come William Waterhouse and Albert Waterhouse, Executors of the last Will of Henry Waterhouse, deceased, defendants in the above entitled action, and demur to plaintiff's bill of complaint on file herein, and for grounds of complaint aver as follows:

I.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this, that it does not appear therein neither can it be ascertained therefrom wherein and whereby said plaintiff is entitled to maintain said action against said defendants William Waterhouse and Albert Waterhouse as such Executors

II.

That said complaint does not state facts sufficient to constitute a cause of action against said Defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this that 255 it does not appear therein, neither can it be ascertained therefrom, whether or not said action commenced by said plaintiff against said defendant Clinton H. Hutchins, Trustee wherein judgment is alleged to have been rendered against said defendant Clinton J. Hutchins, Trustee, has been appealed to the Supreme Court of the Territory of Hawaii, or that said judgment is a final judgment.

III.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this, that no cause of action lies against said defendants William Waterhouse and Albert

Waterhouse as such Executors, or against the Estate of said Henry Waterhouse, deceased.

IV.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this that it appears from said complaint that judgment was rendered against said defendant Clinton J. Hutchins, Trustee, in the sum of Twenty-two Thousand Dollars (\$22,000) which, it is alleged, was the value of the said property founded by the court, while it appears in the return bond attached to said complaint, and made a part thereof, that the value of the property specifically set forth in the bill of complaint filed in said suit and the affidavits filed therein, is of the sum of Fifteen Thousand Dollars (\$15,000.).

V.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this, that it
256 appears from said complaint that said action in which said bond was given was commenced before the Circuit Court of the Third Circuit, Territory of Hawaii; that said action was thereafter transferred from the said Circuit Court of the Third Circuit to the First Court of the First Circuit, Territory of Hawaii; that it does not appear therein, neither can it be ascertained therefrom that the said Henry Waterhouse or his said Executors consented to said transfer.

Wherefore, said defendants William Waterhouse and Albert Waterhouse, Executors of the last Will of Henry Waterhouse, deceased, pray judgment that plaintiff take nothing by this action, and that they, the said Executors, be hence dismissed with their costs.

(Signed)

SMITH & LEWIS,

Attorneys for Said Defendants, William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Indorsement: L. 6023. Circuit Court, First Judicial Circuit, Territory of Hawaii. January (1905) Term. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Trustee, Arthur B. Wood, and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, Defendants. Demurrer of William Waterhouse & Albert Waterhouse, Executors. Filed November 11, 1904, at 3:49 o'clock P. M. J. A. Thompson, Clerk. Service admitted. Kinney, McClanahan & Cooper, Att'ys for [Defs.]* Plaintiff. Smith & Lewis, Attorneys at Law, Judd Building, Honolulu, T. H.

257 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, September Term, A. D. 1904.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Amended Complaint.

To the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Circuit.

Comes now the said plaintiff, William W. Bierce & leave of Court having been first had & obtained, hereby presents its Amended Complaint

P. D. K., Jr.

Limited, and for cause of action against the said defendants, says:

That the plaintiff is now and at all times hereinafter mentioned was a corporation duly organized under the laws of the State of Louisiana, and duly qualified to bring and maintain suit in this Territory; that the defendant Clinton J. Hutchins Trustee is a resident of Honolulu, Island of Oahu, Territory of Hawaii; that the defendant Arthur B. Wood is also a resident of said Honolulu, and that the defendants William Waterhouse and Albert Waterhouse, are the duly qualified and acting executors under the will and of the estate of Henry Waterhouse, deceased, late of Honolulu, and are residing in said Honolulu.

That heretofore, to-wit, on the 21st day of July, 1903, said Clinton J. Hutchins, Trustee as principal and said Henry Waterhouse and Arthur B. Wood as sureties executed and delivered and thereafter, to-wit, on the 1st day of August, A. D. 258 1903, caused to be filed in the Circuit Court of the Third Circuit of the Territory of Hawaii their certain writing obligatory whereby the said principal and the said sureties, their successors and administrators, jointly and severally, became bound unto the William W. Bierce, Limited, plaintiff herein, its successor or successors and assigns, in the sum of Thirty Thousand Dollars, the condition of said writing obligatory being that whereas the said William W. Bierce Limited, had begun in the Circuit Court of the Third Circuit of the Territory of Hawaii a replevin action against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the complaint filed in said action, of the alleged value of Fifteen Thousand Dollars, and requested that said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies and turned over to said plaintiff, and whereas said defendant, being desirous of having said property returned and had required the return thereof from said High Sheriff and his deputies; therefore if the said property and all thereof

should be well and truly delivered to the said plaintiff, if such delivery should be adjudged, and payment to the said plaintiff should be well and truly made of such sum as might, for any cause be recovered against the defendant, then said obligation should be null and void, otherwise to be and remain in full force and effect; that a copy of said writing obligatory is hereto attached, marked "Exhibit A", and made a part hereof; that said property referred to in said bond was upon the execution of said bond duly delivered to the defendant Clinton J. Hutchins, Trustee, who at once resumed possession of the same.

That on or about December 17th, 1903, the said cause between plaintiff and the said Clinton J. Hutchins, Trustee, was by stipulation of the parties in writing and order of Court duly
259 transferred from the Circuit Court of the Third Circuit to the Circuit Court of the First Circuit of the Territory of Hawaii; that thereafter a trial was duly had of said cause in the month of March A. D. 1903, at which trial it appeared from the evidence that the property in question therein was of the value of \$22,000.00; that plaintiff was thereupon, on motion duly made for that purpose, allowed to amend its complaint in said action by alleging that the value of the property in question was \$22,000.00; that on March 19th, 1904 judgment was duly rendered against said Clinton J. Hutchins, Trustee, and in favor of the plaintiff for the return of the aforesaid property, or in case said property was not returned, for the sum of Twenty-Two Thousand Dollars, which was the value of said property as found by the Court; that afterwards, on good cause being shown by the plaintiff, execution was duly issued on said judgment, and was duly returned by the proper officer wholly unsatisfied, whereupon the obligation of said writing obligatory was violated and forfeited and a right of action thereon accrued in plaintiff's favor.

That the aforesaid Henry Waterhouse, surety on said writing obligatory, died at Honolulu on or about the 20th day of February, 1904, leaving a will in which he appointed the defendants William Waterhouse and Albert Waterhouse as his executors and that said will was admitted to Probate by the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit and said executors duly appointed by said Judge on or about the 4th day of April, 1904.

And the said plaintiff further says that on or about the 6th day of September, 1904 and within the time required by law, the said plaintiff duly presented its claim against the Estate of Henry Waterhouse, deceased, to the defendants William Waterhouse and Albert Waterhouse, and that said claim was on or about the 26th day of September, 1904, rejected by said defendants; that on or about the 30th day of September, 1904, plaintiff again presented its claim against said Estate of Henry Waterhouse, deceased, to said defendants, said claim being so presented the second time in order that certain formal inaccuracies in the statement of the first claim might be corrected, but that up to the present time said
260 defendants have failed, neglected and refused to allow or reject the said claim.

And plaintiff further says that six months have elapsed since the Probate of the Will of the aforesaid Henry Waterhouse and the appointment of said defendants as his executors, and that plaintiff is now entitled to sue said defendants under the laws of this Territory.

That no part of the judgment of Twenty-two Thousand Dollars obtained by the plaintiff against the said Clinton J. Hutchins, has been paid by said Clinton J. Hutchins, Trustee, or his sureties said Henry Waterhouse and said Arthur B. Wood, or by any person, and that no part of the property involved in said replevin suit and ordered returned by said judgment has been returned to this plaintiff.

That the plaintiff has been damaged in the premises in the sum of Twenty-two thousand Dollars, together with interest thereon from the 19th day of March, 1904.

Wherefore plaintiff prays the process of this Court to summon the said defendants to appear and answer this complaint at the January 1905 Term of this Honorable Court, and that plaintiff may have judgment against defendants for the sum of \$22,000.00 together with interest thereon from March 19th, 1904, its costs and attorney's commissions.

WILLIAM W. BIERCE, LIMITED,

By Its Attorneys,

(Signed) KINNEY, McCLANAHAN & COOPER.

C. A. GALBRAITH,

Of Counsel.

Plaintiff moves to amend the amended complaint as follows: The words on the first line of page 5, to wit: "Twenty Two Thousand Dollars," be stricken out and the words, "Twenty Eight Thousand One Hundred and Fifty Six and Seventy Four cents" be inserted in lieu thereof. The court ordered the amendment to be made accordingly. Plaintiff also moves that the following words in the lines 1 and 2 page 5 of the said amended complaint to wit: "together with interest thereon from the 19th day of March 1904," be stricken out. The court so orders. Also, Plaintiff moves that the figures \$22,000.00 in line 7 of page 5 of the amended complaint be stricken out and the figures \$28,156.74 be inserted in lieu thereof. The Court so orders. Also, plaintiff moves that the words in line 7 on said page 5, to wit: "together with interest thereon from March 19th 1904" be stricken out. The court so orders.

The court further orders that each and all of said amendments be made upon the face of the said amended complaint in accordance with the foregoing orders.

By order of the court,

May 12, 1908.

(Signed)

JOB BATCHELOR, *Clerk.*

HONOLULU, OAHU,

Territory of Hawaii, ss:

S. H. Derby being first duly sworn on oath deposes and says:

That he is the duly authorized and acting attorney in fact of the above named plaintiff William W. Bierce Limited in this jurisdiction; that said William W. Bierce Limited, is a corporation duly organized and existing under the laws of the State of Louisiana and has no other representative than affiant in this jurisdiction except its attorneys at law; that he has read the foregoing complaint and
 261 knows the contents thereof, and that the matters and things therein alleged and set forth are true.

(Signed)

S. H. DERBY.

Subscribed and sworn to before me this 22nd day of December,
 A. D. 1904.

(Signed)

WM. J. FORBES,

[SEAL.]

Notary Public, First Judicial Circuit.

262

EXHIBIT "A."

Circuit Court, Third Circuit, Territory of Hawaii.

Stamps.

WILLIAM W. BIERCE, LTD., a Corporation, Plaintiff,

v.

CLINTON J. HUTCHINS, Trustee.

Replevin.

Return Bond.

Know all men by these presents that we, Clinton J. Hutchins Trustee, as principal and Henry Waterhouse and Arthur B. Wood, as sureties are held and firmly bound unto William W. Bierce Company Ltd., its successor or successors and assigns in the sum of Thirty Thousand (\$30,000.) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors herein and administrators jointly and severally by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000, as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies and turned over to said plaintiff, and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

Now therefore if the said property and all thereof shall be well and truly delivered the said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Sg.)	CLINTON J. HUTCHINS, <i>Trustee.</i>
(Sg.)	HENRY WATERHOUSE, <i>Surety.</i>
(Sg.)	ARTHUR B. WOOD, <i>Surety.</i>

The foregoing bond is approved as to its sufficiency of sureties.
Dated July 21, 1903.

(Sg.)	A. M. BROWN, <i>High Sheriff.</i>
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Indorsements: 1370 L. 5782. Circuit Court Third Circuit Territory of Hawaii. William W. Bierce, Ltd., a corporation, Plaintiff vs. Clinton J. Hutchins, Trustee, Defendant. Return Bond. Filed Aug. 1st 1903 7 o'clock a. m. (Sgd.) J. P. Curtis, Clerk. Law No. — Circuit Court First Circuit Territory of Hawaii. William W. Bierce, Ltd. Plaintiff, vs. Clinton J. Hutchins, Trustee, et al. Defendants. Amended Complaint. Hon. J. T. De Bolt, Judge. Filed Dec. 22d, 1904, at 2:55 P. M. P. D. Kellett, Jr. Clerk. Kinney, McClanahan & Cooper, C. A. Galbraith 303-305 Judd Bldg. Honolulu Attorneys for Plaintiff (Office No. —.)

263 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, September Term, A. D. 1904.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Answer of William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Now come William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, and answering plaintiff's amended complaint on file herein deny the truth of each and every allegation in said amended complaint contained.

Wherefore said defendants pray to be hence dismissed with their costs.

Dated Honolulu, November 3, 1905.

WILLIAM WATERHOUSE &
ALBERT WATERHOUSE,

Executors,

(Signed)

By SMITH & LEWIS, *Their Attorneys.*

Indorsements: L. 6023. Circuit Court, First Circuit, Territory of Hawaii. September Term, A. D. 1904. William W. Bierce Limited, vs. Clinton J. Hutchins, Trustee, Arthur B. Wood and William Waterhouse & Albert Waterhouse Executors. Answer of William Waterhouse and Albert Waterhouse, Executors. Filed Nov. 3, 1905 George Lucas, Clerk. Smith & Lewis, Attorneys at Law Judd Building, Honolulu, T. H. Due service by copy of the within answer is hereby admitted this 3rd day of November 1905 Kinney, McClanahan & Cooper E. B. M. Attorneys for Plaintiff.

264 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Certificate to Transcript of Record.

TERRITORY OF HAWAII,
Honolulu, Oahu, ss:

I, J. A. Thompson, Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, do hereby certify that the foregoing documents and attached hereto together with the indorsements thereon and enumerated hereunder, to wit:

1. Complaint, and attached thereto as Exhibit "A" thereof is Copy of the Return Bond, dated July 21, 1903.

2. Demurrer of William Waterhouse and Albert Waterhouse Executors under the Will, and of the Estate of Henry Waterhouse, deceased, to plaintiff's complaint,

3. Amended Complaint, and attached thereto as Exhibit "A" thereof, is copy of the Return Bond, dated July 21, 1903, and

4. Answer of William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, to the Amended Complaint,

are full true and correct copies of the originals thereof which are now on file in the Clerk's Office of the said Circuit Court in the above entitled cause. (Law Division Number 6023).

Witness my hand and the Seal of said Circuit Court, at Honolulu, Oahu, this 28th day of June, A. D. 1909.

(Signed) J. A. THOMPSON,
[SEAL.] Clerk Circuit Court of the First Judicial
Circuit, Territory of Hawaii.

Endorsed: No. 434. Circuit Court First Circuit Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants. Certified Transcript of Record Rec'd & Filed in the Supreme Court June 30, 1909, at 3:55 o'clock P. M. J. A. Thompson, Clerk. A. G. M. Robertson, Attorney for Plaintiff. Stangenwald Bldg. Honolulu, T. H.

265

326.

APRIL 26TH, 1904.

315.

Clinton J. Hutchins, Trustee, City.

DEAR SIR: Without prejudice to our claim now made or which may hereafter be made that you have not made a re-delivery to William W. Bierce Limited of the property which is the subject matter of the action in replevin brought by William W. Bierce Limited against you, we for William W. Bierce Limited do make you the following offer.

In the event of our receiving from you an actual redelivery of the railroad and its appurtenances, the subject matter of the above mentioned suit, we will sell the same to you at any time within 30 days from this date for the sum of \$19,000 Gold Coin, you to take the delivery of said property from us as it now lies and is situate at Kailua, Hawaii. Said \$19,000 being net to our client and to be paid here in Honolulu to its authorized attorney in fact.

Respectfully yours,

(Sig.) KINNEY, McCLANAHAN & COOPER.
E. B. M.

This option of course is subject to the one previously given to the Kapiolani Estate Ltd.

(Sig.) KINNEY, McCLANAHAN & COOPER.
E. B. M.

Endorsed: L. 6023. Plaintiff's Exhibit L. L. Plaintiff's Exhibit L. L. Law No. 6023 Plaintiff's Exhibit L. L. Filed May 14th, 1908. Job Batchelor, Clerk.

266

KEALAKEAKUA, May 21, 1904.

J. K. Nahale, Esq., Dep. Sheriff North Kona.

SIR: You are hereby notified that the Kona Sugar Co. its successors or assigns, do not own, or lease, any right of way, for a

Rail Road, across or over the lands of Maihi 1, Maihi 2nd, Kuamoo, Kawainui 1, Kawainui 2, & Lehuula nui, which lands are owned by us.

You are hereby forbidden & all persons under you from trespassing or removing any property from these lands without special permission from the undersigned.

(Signed)

J. D. PARIS,
MRS. E. ROY,
J. D. JOHNSON,
W. H. JOHNSON,
W. H. SHIPMAN,

(Signed) By Their Attorney in Fact, J. D. PARIS.

Endorsed: Law. 6023. Plaintiff's Exhibit M. M. Plaintiff's Exhibit M. M. Law. No. 6023. Plaintiff's Exhibit M. M. Filed May 19th, 1908. Job Batchelor, Clerk.

267 Stamped \$28.00.

This Indenture made this 13th day of June, A. D. 1903 by and between Clinton J. Hutchins, Trustee, of Honolulu, Island of Oahu, Territory of Hawaii, party of the first part, and Henry Waterhouse Trust Company, Limited, an Hawaiian corporation, party of the second part, Witnesseth: Whereas the said Clinton J. Hutchins, Trustee, is the grantee in that certain deed dated June 13th, 1903, made by F. L. Dortch, Receiver of the Kona Sugar Company, Limited, of certain plantation property in Kona, Island and Territory of Hawaii, in said deed mentioned and referred to, and Whereas it is the desire of the said party of the first part and others interested in said property and represented by him, to secure the said party of the second part for money loaned and advances to be made, not to exceed the sum of Twelve Thousand Two Hundred & Fifty Dollars (\$12,250.00) by the said party of the second part to the said party of the first part, in case the said party of the first part, his successors or assigns, deems it advisable. Now Therefore, This Indenture Witnesseth: That said party of the first part in consideration of the sum of Ten Dollars (\$10) to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the sum of Twelve Thousand, Two Hundred and Fifty Dollars (\$12,250) advanced and to be advanced as aforesaid, does hereby grant, bargain sell and convey unto said party of the second part all the right, title and interest of the said party of the first

G. L. B. part in and to all and singular those certain goods, chattels, effects and property, real, personal and mixed, conveyed to said party of the first part by deed of F. L. Dortch, Receiver of the Kona Sugar Company, Limited, dated June 13th, 1903, i. e. all of the lands, tenements and hereditaments, all interest in lands, leases and leaseholds, easements, railroad, railroad equipment, locomotives, flat cars, cane cars, sugar mill and equipment, cane conveyors, buildings, tools, implements, wagons, vehicles, growing crops, live stock, choses in action fran-

chises, and all rights and privileges of said company conveyed to said party of the first part, and the goodwill of the same; conveying hereby all and every right, title and interest which the said party of the first part may have in and to said property and effects, whether the same be mentioned hereinbefore or not; and constituting and being the same property conveyed to the said party of the first part by Deed of F. L. Dortch, Receiver of the Kona Sugar Company, Limited, dated June 13th, 1903, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold all of said property unto the said Henry Waterhouse Trust Company, Limited, and its successors and assigns forever upon the Trusts and subject to the powers, provisos, agreements and declarations hereinafter expressed or set forth. It is hereby declared, covenanted and agreed between the said parties hereto

that the said party of the second part shall have full

G. L. B. power and authority to manage and control the property hereby conveyed so far as may be necessary to conserve and preserve the same, to harvest the sugar cane that may be growing or situated thereon, and to convert the same into sugar; to sell and dispose of said sugar; to receive and collect all moneys that may be obtained from any source of income or profit from said plantation, and give all necessary and proper vouchers

269 and acquittances therefor; to expend such sums as may be necessary to pay for the ordinary expenses of harvesting the crop of Sugar cane now on said plantation; but that no funds shall be expended for permanent improvements outside of what may be actually necessary or convenient to harvest said crops, without the consent of the said party of the first part or his successors or assigns. It is hereby further covenanted, agreed and declared between the parties hereto that all funds which shall come into the hands of the said party of the second part from the sales of sugar or otherwise shall be disposed of as follows: 1. To the payment of the principal amount of all advances made by the said party of the second part and interest on the same at the rate of Eight (8) per cent per annum on daily overdraft balances. 2. To the payment of a commission of Two and one-half ($2\frac{1}{2}$) per cent to the said party of the second part, on all sales of sugar for said plantation,

as full compensation as managing agent of said plantation, and the further sum of Fifteen Hundred Dollars, (\$1500) as full compensation as Trustee under this

Deed of Trust. 3. To the payment of the expenses of harvesting the matured crop of sugar cane now on said property; and of conserving and preserving said property. 4. To the payment of taxes on said property, and such rents as the party of the first part, or his successors or assigns may be liable for. 5. The balance to be paid to the party of the first part or his successors and assigns. Provided however, and these presents are made upon the express condition that all advances to the amount of Twelve Thousand Two Hundred and Fifty Dollars (\$12,250) made by the said party of the second part

for the purposes herein mentioned shall constitute a lien upon and be secured by these presents. And that all advances so made by the said party of the second part shall be immediately due and payable, and if the moneys coming into the hands of the said party of the second part from the sales of sugar or otherwise shall be insufficient to satisfy said advances within six months after the same have been made, provided, if the harvesting of the sugar cane now on said property shall be then completed, otherwise upon the completion of such harvesting, and said advances shall not have been paid to said party of the second part, or in the event that legal or equitable proceedings be instituted at a time that said party of the second part shall not have been reimbursed for advances by it made, which said legal or equitable proceedings shall render the further operation and maintenance of said plantation impracticable, then it shall be lawful for

G. L. B. and the said party of the second part, and it and its successors and assigns are hereby authorized as the attorney or attorneys with power irrevocable of the said party of the first part, to foreclose this Trust Deed by bill in equity or otherwise, or to enter upon and take possession of said premises or with or without entry to sell the same at public auction in Honolulu with all improvements that may be thereon, first publishing a notice of the time and times and place and places of such sale or sales according to law, and convey the said premises so sold by proper conveyances to the purchaser or purchasers thereof, and such sale or sales shall forever bar the said party of the first part, and all persons claiming under him, from all right and interest in said premises whether at law or in equity. And out of the money arising from such sale or sales the party of the second part or its successors and assigns shall

be entitled to retain all sums then secured by this deed whether then or thereafter payable, including all costs, charges and expenses incurred or sustained by them by reason of any default in the performance or observance of the covenants and conditions of this Deed of Trust, and an attorney's fee, and also all advances and expenditures made necessary by any default of the party of the first part in the performance or observance of said covenant and conditions, and in order to protect said security and save said property from loss or injury, rendering the surplus, if any to the said party of the first part or his successors or assigns. And

it is agreed that the party of the second part its successors or assigns, or any person or persons in its or their behalf may purchase at any sale made as aforesaid, and that no other purchaser shall be answerable for the application of the purchase money. Subject to the terms, conditions, covenants and stipulations herein contained, this Indenture shall remain in full force and effect for the period of one year, or until said party of the second part shall be repaid for all advances made by it under the terms of this Indenture, unless sooner terminated by agreement of the parties hereto or their successors or assigns of by foreclosure or sale by the said party of the second part pursuant to the terms hereof. In Witness whereof, the said parties hereto have

caused these presents to be duly executed the day and year first above written.

CLINTON J. HUTCHINS, *Trustee.*
HENRY WATERHOUSE TRUST
COMPANY, LTD.,
By ARTHUR B. WOOD,
Its Vice-President,
By RICHARD H. TRENT,
Its Treasurer.

TERRITORY OF HAWAII,
Island of Oahu, ss:

On this 15th day of July, A. D. 1903, personally appeared
272 before me Clinton J. Hutchins, Trustee known to me to be the
person described in and who executed the foregoing instru-
ment, and who acknowledged to me that he executed the same freely
and voluntarily for the uses and purposes therein set forth.

GEO. L. BIGELOW, []
Notary Public, First Jud. Circuit.

TERRITORY OF HAWAII,
Island of Oahu, ss:

On this 20 day of July, A. D. 1903, personally appeared before
me Arthur B. Wood, and Richard H. Trent, vice Prest. and Treas-
urer, respectively, of Henry Waterhouse Trust Co. Ltd. known to
me to be the persons described in and who executed the foregoing
instrument and who severally acknowledged to me that they executed
the same freely and voluntarily for the uses and purposes therein
set forth, and the said Arthur B. Wood and Richard H. Trent fur-
ther acknowledged to me that they executed the same as the free act
and deed of said corporation.

G. L. B. GEO. L. BIGELOW, []
Notary Public, First Jud. Circuit.

Recorded & Compd. this 27th day of July, A. D. 1903, at 3:56
o'clock P. M.

THOS. G. THRUM,
Registrar of Conveyances.

OFFICE OF THE REGISTRAR OF CONVEYANCES,
HONOLULU, T. H., May 5th, 1908.

The foregoing is a true copy of record recorded in the Office of
the Registrar of Conveyances of the Territory of Hawaii in Book
251 pages 42-46.

Attest:

(Signed) CHAS. H. MERRIAM, [SEAL.]
Registrar of Conveyances for the Territory of Hawaii.

Endorsed: Law 6023. Certified Copy Tr. Deed. C. J. Hutchins,
Tr. To Henry Waterhouse Trust Co. Ltd. Dated June 13th, 1903.

Recorded Book 251, Pages 42-46. Plaintiff's Exhibit N. N. Registry of Conveyances for the Territory of Hawaii at Honolulu. Plaintiff's Exhibit N. N. Law No. 6023. Plaintiff's Exhibit N. N. Filed May 19th, 1908. Job Batchelor, Clerk.

273

EXHIBIT "A." R. C. S., COM'R.

PL'FF'S EXH. "B."

William W. Bierce, General Southern Agent, Illinois Steel Co., Chicago, Illinois, 1106, 1107, 1108, 1109, and 1110 Hennen Building, New Orleans, La., U. S. A.

Cotton Ties, Steel Rails, Frogs, Switches, Plate-, Cement.

Quotations subject to change without notice.

All agreements contingent upon strikes, accidents and other delays unavoidable and beyond control.

Duplicate.

HONOLULU, HAWAIIAN ISLANDS, *Feb'y 21st*, 1900.

Kona Sugar Company, Hawaiian Islands.

GENTLEMEN: For the sum of Forty Six (\$46.40) Dollars and forty cents per ton of 2,240 pounds, we propose to furnish you with five hundred and fifty (550) Tons of first quality Steel "T" Rails, weighing 35 lbs. to the yard. Also, to furnish sufficient complete joints to lay said Rails for the sum total of Two Thousand Two Hundred and Eighty One (\$2,281.00) Dollars, one complete joint being furnished for each Rail; a complete joint consisting of two Angle Bars and four bolts. Also, for the sum of One Thousand Four Hundred and Forty (\$1,440.00) Dollars to furnish sufficient 4½" x ½" Railroad Track Spikes to lay the 550 Tons of Rails with cross ties 2' between centers.

The above prices are all freight prepaid to Honolulu, the Kona Sugar Company to reimburse Bierce for the insurance to paid thereon.

We also to furnish for the sum of Five hundred and Forty Five (\$545.00) Dollars, c. i. f. prepaid to Honolulu, ten sets of 35 lb. 6" Split Switch points, tie rods and slide plates; all designed for 3' gauge of track.

Further, to furnish sixteen (16) cars 20' long, 7' wide and *states* 5' high above floor line, for 3' gauge of track; as per the following specifications: price to be three hundred and forty (\$340.00) dollars per car c. i. f. prepaid to Honolulu.

Lumber.

6 Longitudinal Sills, 4" x 8" Pine.
2 End Sills, 6" x 10" Oak (planking 2").

- 2 Sub End Sills, $5\frac{1}{2}$ " x 6" Oak.
- 4 Draft Timbers, $2\frac{1}{2}$ " x $5\frac{1}{2}$ ", Oak.
- 2 Cross Ties, 3" x 5" Oak.
- 6 End Stakes, 4" x 5" Oak, 5' above floor line of car.
- Filler blocks of Oak.

Construction.

Sills will be mortised and tenoned to fit. Draft timbers will be bolted to both center sills, and sills and sub. end sills, and be protected by cast iron mortise blocks. Cross ties will support car in center in conjunction with truss rods. End stakes will be mortised into end sills, and braced with angle or T iron for 3' of their length. All wood to be coated with mineral paint; all iron work with asphaltum.

No floor planks, or side stakes shall be furnished.

Trucks.

Two Standard Trucks of the diamond type, provided each with four wheels, chilled charcoal iron, 24" in diameter, $3\frac{1}{2}$ " tread, 275 lbs. each, mounted on axles $3\frac{3}{4}$ " diameter; Journals $3\frac{1}{2}$ " diameter and having solid brass journal bearings. The top arch bar shall be 3" x 1", the inverted arch bar 3" x $\frac{3}{4}$ " and the tie bars 3" x $\frac{5}{8}$ ", bent to shape and drilled $\frac{3}{4}$ " column and journal box bolts. Journal boxes of cast iron provided with spring lid and hinged at the top. Bolster springs are to be in nests of four each, provided with plates top and bottom and of such sizes and dimensions to suit capacity of cars. Truck bolsters shall be I

(Endorsed on the back: "M. W. McChesney & Sons.")

- 274 William W. Bierce, General Southern Agent, Illinois Steel Co., Chicago, Illinois, 1106, 1107, 1108, 1109 and 1110 Hennen Building, New Orleans, La., U. S. A.

Cotton Ties, Steel Rails, Frogs, Switches, Plate, Cement.

Quotations subject to change without notice.

All agreements contingent upon strikes, accidents and other delays unavoidable and beyond control.

EXHIBIT A, p. 2. R. C. S., Com'r.

Kona Sugar Co. No. 2.

Beams and Channels—there shall be no wood work of any kind in the truck proper. Body bolster shall be of steel.

Stake Pockets.

Side Stake pockets, 24 in number (12 on each side of the car) of malleable iron for $3\frac{1}{2}$ " x $3\frac{1}{2}$ " stake at top, and diminishing to

3" x 3" at bottom. They shall be fastened to outside sill with $\frac{5}{8}$ " U bolt, said U bolt passing through filler block to intermediate sills and fastened with nut on cast iron washer.

Ends.

The end stakes shall be tenoned into end sills and braced in front with T or angle for 3' of the stake, and further braced with malleable iron bracket at end of car. Shall be bored for $\frac{1}{2}$ " bolts to hold planking in position. Shall be held in position at bottom each by two $\frac{5}{8}$ " eye bolts, passing through bottom of stake and sill and fastened to intermediate sills.

Draw Gear.

Draw gear consists of Cast Iron drawheads, wrought iron follower plates, guides, etc., with draw springs and cast iron draw bar stops. Draw timbers are secured to center sills each with two $\frac{5}{8}$ " bolts, provided with cup, washers on top and double nuts and wrought iron washers on bottom. Are further secured to buffer blocks (sub end sills) with four $\frac{5}{8}$ " bolts. Drawbar carrier is made of $2\frac{1}{4}$ " x $\frac{3}{8}$ " with ends gibbed to prevent draw timbers from spreading. Buffer block, or sub end sill is faced with plate of 4" x 8" iron.

Brake.

Car equipped with hand brake on each truck each with end wheel working on end sill.

General.

Lumber entering into the manufacture of this car to be of good merchantable quality. Cars are to be shipped knocked down. All work to be done in a thorough and workmanlike manner. Car guaranteed for (15) tons carrying capacity.

The locomotives to be furnished are as follows:

One 9" x 14", Class "A," Saddle Tank locomotive of the Dickson Locomotive Works make, as per photograph attached, signed by both parties: hereto for identification. Price of this locomotive to be Three Thousand Seven Hundred and Fifty Five (\$3,755.) Dollars, c. i. f. prepaid to Honolulu. This locomotive to be for 36" gauge, marked "Kona Sugar Company," "No. 1," and to be fitted with steam brake.

Also

One 10" x 16", Class "M," back truck Saddle Tank Locomotive, with six driving wheels, to be manufactured by the Dickson Locomotive Works, for 36" gauge, to be fitted with steam brake and a duplicate in construction of the "Halawa," photo signed by both parties and attached hereto for identification. The approximate weight of this locomotive ready for service will be 38,000 pounds, 31,500 lbs. of which will be carried on the driving wheels. The

driving wheels of this locomotive will be 33" diameter, whilst those under the trucks will be 18" diameter. The boiler pressure will be 150 lbs., water capacity 500 gallons, piston rod of machine steel; to have two sand boxes one forward and one back of the driving wheels; to be furnished with bal-oon shaped stack with spiral cone provided with steel wire netting. Cross head pump to be on right side and injector on left side. Fire box of steel. Price of this loco-

(Endorsed on the back: "M. W. McChesney & Sons.")

- 275 William W. Bierce, General Southern Agent, Illinois Steel Co., Chicago, Illinois, 1106, 1107, 1108, 1109 and 1110 Hennen Building, New Orleans, La., U. S. A.

Cotton Ties, Steel Rails, Frogs, Switches, Plate, Cement.

Quotations subject to change without notice.

All agreements contingent upon strikes, accidents and other delays unavoidable and beyond control.

Ex. "A," p. 3. R. C. S., Com'r.

Kona Sugar Co. No. 3.

tive to be five Thousand Four Hundred and Ninety Five (\$5,495.00) Dollars c. i. f. prepaid to Honolulu. Locomotive to be marked "Kona Sugar Company," "No. 2."

These locomotives will each have two headlights, be constructed for use of either wood or coal as fuel; sold and guaranteed to be of best material, workmanship and design, and equal in every degree to locomotive of same size and type built and manufactured by the Baldwin Locomotive Works.

Lastly, there is to be furnished one "Howe" Narrow Gauge Track Scale, to have a capacity of 25 Tons, platform 30' in length—foundation plan to be furnished by us—timber, work and foundation to be furnished by the Kona Sugar Company. Price \$500.00 c. i. f. prepaid to Honolulu.

Deliveries.

Shipment of one-third of the Rails, joints therefor, all the spikes, all the switches, four cars, the 9" x 14" Locomotive, and the scales from works in four months after acceptance of this proposition; another one-third of the rails, together with the joints therefor, in five months after acceptance of this proposition; the balance of the Rails and Joints in six months after acceptance of this proposition; the balance of the cars (12) and the 10" x 16" locomotive may be shipped at any time to insure delivery at Honolulu December 1st to 15th after signing of contract.

Terms of Payment.

Cash upon presentation of demand draft attached to bill of lading, issued by initial line of railroad, showing material to have been shipped through to Honolulu. Insurance policy shall be transmitted as soon as possible after shipment is made, when it shall be determined just what vessel shall haul the material from port on mainland to Honolulu.

All monies are payable in New York or Chicago funds; the Kona Sugar Company to pay all items of exchange.

Twenty five hundred (\$2,500.00) Dollars in paid up stock of the Kona Sugar Company shall be the first payment on account of the purchases herein proposed; this \$2,500.00 to be covered by 5% deductions from the materials as shipped. Bierce agrees to deposit this \$2,500.00 stock of the Kona Sugar Company with the Banking House of Bishop & Company in the City of Honolulu, as guarantee for the final consummation of the contract.

NOTE.—Where reference herein is made to Honolulu as point of delivery—if vessels are available about time material is ready to ship sellers will make delivery at Kailua, District of Kona, in the Hawaiian Islands; but this is not to be construed as in any manner obligatory or binding.

This proposition is a confirmation of the verbal one made to

(Endorsed on the back: "M. W. McChesney & Sons.")

276 William W. Bierce, General Southern Agent, Illinois Steel Co., Chicago, Illinois, 1106, 1107, 1108, 1109 and 1110 Hennen Building, New Orleans, La., U. S. A.

Cotton Ties, Steel Rails, Frogs, Switches, Plate, Cement.

Quotations subject to change without notice.

All agreements contingent upon strikes, accidents and other delays unavoidable and beyond control.

Ex. "A," pp. 4. R. C. S., Com'r.

Kona Sugar Co. No. 4.

the Directors of the Kona Sugar Company at their meeting, Saturday, February 17th, 1900, and becomes binding on all parties when accepted by their agents, M. W. McChesney & Sons.

When duly accepted and made binding, said contract is amenable to the laws of the Hawaiian Islands in effect at date of signing.

Yours very truly,

(Signed) WILLIAM W. BIERCE, LTD.,
By FRANK DAVIES.

Accepted in duplicate by

THE KONA SUGAR CO., LTD.,

(Signed) By M. W. McCHESNEY & SONS, *Agents*.

This 22d day of February, 1900.

Truss Rods on cars 4 in number, 1" dia. upset ends $1\frac{1}{8}$ "—Turn-buckles 1".

W. W. BIERCE, LTD.,

(Signed) By FRANK DAVIES.

(Endorsed on back: "M. W. McChesney & Sons.")

277 Law Offices of
Kinney, McClanahan & Cooper,
Judd Building,
Honolulu, Hawaii.

William A. Kinney, Edmund B. McClanahan, Henry E. Cooper,
Charles S. Dole, S. Hasket Derby.

Cable Address, "Hawaii," Honolulu, Lieber's Code.

APRIL 18TH, 1904.

Clinton J. Hutchins, Trustee, City.

DEAR SIR: On behalf of William W. Bierce Limited, we hereby make demand upon you for the return to our client of the following described property.

362 tons of steel T rails weighing 35 pounds to the yard
Joints for laying 550 tons of steel T rails.
Railroad track spikes to lay 550 tons of said rails
10 set- of 35 pound split switch material, complete
16 railway cars 25 feet long 7 feet wide for 3 ft. gauge track
One 9 x 14 Class "A" saddle tank locomotive
One 10 x 16 back saddle tank locomotive
One Howe Narrow gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers, 3 feet
One rail bender
One track drill
One section car with seats
Two Jacks

We will take from you the delivery of this property at any convenient and appropriate place that you may name, but we want it distinctly understood that we will accept nothing but an actual delivery. We are informed that title to a large part of this property is claimed by others, and we do not propose to take from you any questionable delivery or one which might involve us in litigation in the assertion of our rights thereunder.

If we receive no satisfactory response from you to this demand

before the hour of 11 o'clock a. m. April 19th, 1904, or if before this hour the sum of \$22,000 is not paid to us under the alternative judgment which we have against you, we will forthwith take such steps as we shall deem appropriate in the premises for the

278 satisfaction of said judgment.

We also make demand upon you for the sum of \$1,198.20, which sum must be paid into our hands on or before the hour of 11 o'clock a. m. of Tuesday April 19th, 1904. Failing to hear from you by that time, execution will be placed in the hands of the proper officer with instructions to levy and make good that amount on any property belonging to you wheresoever the same may be situate. The expense of this course and the necessary loss to you by forced sale of personal property which may be levied upon can alone be avoided by the payment of the money before the hour named.

Respectfully yours,

KINNEY McCLANAHAN & COOPER.
E. B. M.

(Sig.)

Endorsed: L. 6023 Defendant's Exhibit 2 L. 6023 Rec'd Apr. 18 about 11 a. m. & ans. by letter of 18th served on Apr. 19 ab't 10:30 a. m. Def't's Exhibit 2 Law No. 6023 Defendant's Exhibit 2 Filed May 13th. 1908 Job Batchelor, Clerk.

279

HONOLULU, April 18th, 1904.

Messrs. Kinney, McClanahan & Cooper, Attorneys for William W. Bierce, Ltd., City.

GENTLEMEN: In response to the demand made upon me this day by you on behalf of William W. Bierce, Ltd., for the return of certain property, I here and now place at your disposal, deliver over and return to you the said property, the same being described as follows, to wit:

- 362 tons of steel T rails weighing 35 pounds to the yard.
- Joints for laying 550 tons of steel T rails,
- Railroad track spikes to lay 550 tons of said rails,
- 10 set- of 35 pounds split switch material complete.
- 16 railway cars 25 feet long 7 feet wide, for 3 ft. gauge track,
- One 9 x 14 Class "A" saddle tank locomotive.
- One 10 x 16 back saddle tank locomotive,
- One Howe narrow gauge track scale, capacity 25 tons.
- One set re-railer-
- Four track guagers, 3 feet,
- One rail bender,
- One track drill,
- One section car with seats.
- Two Jacks.

I return and deliver over to you each and all of the aforesaid property in the same condition as, and in the exact situs where, the same was when I purchased it at the Receiver's sale of the Kona Sugar Company, Limited, on May 9th A. D. 1903, and in the same condition as, and in the exact situs where, the same was when received by me from the High Sheriff of the Territory of Hawaii upon

the giving of the redelivery bond by me in the case of William W. Bierce, Ltd., vs. Clinton J. Hutchins, Trustee, by virtue of which bond received back possession of said property, after the same had been taken possession of by the said Sheriff for said plaintiff William W. Bierce, Ltd., in the action aforesaid.

I make this return and delivery of said property in pursuance of the Order of the Writ in said case issued; and without prejudice to my rights under the Bill of Exceptions in said cause filed, and other exceptions therein taken or allowed; and without admitting any right, title or interest in or to the aforesaid property to be in the said William W. Bierce Ltd., and without waiving any of my rights in the premises.

The sum of \$1,198.20, damages, in said action has been paid to you, but with the same reservation of all my rights as in the return and delivery of the aforesaid property.

I now request you to consent to the recall of the Writ of Execution in said action heretofore issued.

Very respectfully,
(Signed) CLINTON J. HUTCHINS, *Trustee*.

Endorsed: L. 6023 L. 6023 Defendant's Exhibit 3 Law No. 6023 Defendant's Exhibit 3 Filed May 13th 1908 Job Batchelor, Clerk.

281 Law Offices of
Kinney, McClanahan & Cooper,
Judd Building,
Honolulu, Hawaii.

William A. Kinney, Edmund B. McClanahan, Henry E. Cooper,
Charles S. Dole, S. Hasket Derby.

Cable Address, "Hawaii," Honolulu, Lieber's Code.

APRIL 21ST, 1904.

Mr. Clinton J. Hutchins, Trustee, City.

DEAR SIR: We beg to acknowledge receipt of your favor of the 18th, in response to our demand for a re-delivery to William W. Bierce Limited of the property, which is the subject matter of the replevin suit recently tried before the Honorable John T. De Bolt. In answer we beg to say that your purported re-delivery to us of this property is satisfactory and acceptable only in the event of our being able under it to take actual possession. As you have been informed by us, there is some question as to whether we would be successful in taking actual possession of this property because certain parties interested with you in the re-habilitation of the Kona Plantation make claim to certain portions of the property in the event of our attempting to take possession thereof. These same parties making no claim as long as the property remains available for the re-habilitation of the plantation. Of course under such circumstances our attempting to take possession might lead to litigation with these parties,

and we would therefore consider your delivery as invalid. We will at once notify you in the event we are unable to secure actual possession of the property.

We also take it for granted that from your standpoint, a re-delivery having been made, you will not use or attempt to use any of the property in question.

Respectfully yours,

(Sig.) KINNEY, McCLANAHAN & COOPER,
E. B. M.,

Attorneys for William W. Bierce, Ltd.

Endorsed: Rec'd by C. J. Hutchins Apr. 21 ab't 3:30 P. M. L. 6023 Def't's exhibit 4 Def't's Exhibit 4 Law No. 6023 Defendant's Exhibit 4 Filed May 13th 1908 Job Batchelor, Clerk.

283

Law Offices of
Kinney, McClanahan & Cooper,
Judd Building,
Honolulu, Hawaii.

William A. Kinney, Edmund B. McClanahan, Henry E. Cooper,
Charles S. Dole, S. Hasket Derby.

Cable Address, "Hawaii," Honolulu, Lieber's Code.

MAY 16TH, 1904.

Clinton J. Hutchins, Trustee, City.

DEAR SIR: Because of the illness of the writer of this letter, he having had sole charge of the W. W. Bierce Limited litigation, the matter of the re-delivery to us of the railroad material sued for has not received appropriate attention. I am now able to be about a little and desire to take the question up.

You are aware that you have tendered us a return of this property and we have accepted such tender conditioned upon its being an actual delivery. Mr. M. F. Scott who is interested with you in the Kona Sugar Company purchase -as made the statement, since the judgment rendered against you by Judge De Bolt, that the rails were laid in part on lands without the permission of the owners thereof, and in some cases during the night time, and that any attempt on our part to remove these rails would lead to trouble and litigation. We are prepared to substantiate the fact of this statement having been made by Mr. Scott acting as your representative.

You will see that this statement of his seems on its face entirely inconsistent with his sworn testimony that the Kona Sugar Company held licenses or rights of way or leases covering the whole of the Bierce track, and as I remember correctly, these purported leases, rights of way and licenses were produced by him in Court though not examined or introduced in evidence. Now we intend to fairly and bona fide attempt to take possession of this railway material, and it would seem to us fair and proper that you on your part should let us have an explanation of Mr. Scott's state-

ment made as herein on your behalf. The whole matter can be very materially cleared for us if you will allow an inspection of the various papers held by you under which you claim the right to enter upon these lands and maintain there the railroad.

Will you please therefore advise us at once if you will allow us to inspect the documents referred to. May we expect an answer this day.

Respectfully yours,

KINNEY, McCLANAHAN & COOPER.

(Sig.)

E. B. M.

Endorsed: L. 6023 5 Defendant's exhibit 5 Law No. 6023
Defendant's Exhibit 5 Filed May 13th, 1908 Job Batchelor,
Clerk.

285

Law Offices of
Cathcart & Milverton,
Rooms 5, 6, 7, & 8 Morgan Bldg.,
Kaahumanu St.

Jno. W. Cathcart, Fred. W. Milverton.

Phone, Main 303; Cable Address, "Catha."

HONOLULU, HAWAII, May 26th, 1904.

Messrs. Kinney, McClanahan & Cooper, Attorneys for Wm. W. Bierce, Ltd., City.

GENTLEMEN: Owing to inability to consult our client Mr. Hutchins, we have unavoidably delayed answering your letter of the 16th inst. We now say in reply thereto, that on April 18th last our client surrendered to you all of the property for which you obtained judgment in the case of Bierce v. Hutchins, Trustee, in response to your demand of the same date; since then we have considered the property to be in your possession, and no longer in the possession or control of the defendant, Mr. Hutchins. As to any statements made by Mr. Scott, we do not understand that Mr. Hutchins is in any way responsible. However, Mr. Scott has authorized us to say that he never made the statements, contained in your letter.

We can see no good end to be subserved by any examination of the deeds of right of way or leases, and, accordingly do not submit them to you.

Respectfully yours,

(Signed)

CATHCART AND MILVERTON,

Attys for C. J. Hutchins, Trustee.

P. S.—We enclose a letter of Mr. Scott's which speaks for itself.

(Sig.)

C. & M.

Endorsed: Law 6023. Exhibit 6. Def't's 6. Law No. 6023.
Defendant's Exhibit 6. Filed May 13th, 1908. Job Batchelor,
Clerk.

286

HONOLULU, May 18th, 1904.

Messrs. Kinney, McClanahan & Cooper, Honolulu.

DEAR SIR: Your letter of the 16th inst., to Mr. C. J. Hutchins has been referred to me for reply to certain clauses therein. Said clauses being as follows:

"Mr. M. F. Scott who is interested with you in the Kona Sugar Company purchase has made the statement, since the judgment rendered against you by Judge De Bolt, that the rails were laid in part on lands without the permission of the owners thereof, and in some cases during the night time, and that any attempt on our part to remove these rails would lead to trouble and litigation. We are prepared to substantiate the fact of this statement having been made by Mr. Scott acting as your representative.

You will see that this statement of his seems on its face entirely inconsistent with his sworn testimony that the Kona Sugar Company held licenses or rights of way or leases covering the whole of the Bierce track."

In reply will say:

First. No rails were ever laid during the night time, nor was there any occasion for so doing; and there were no Bierce rails laid on any lands without permission of the land owners, such permission being in writing, except for one short section of perhaps 200 feet, for which, I find the permission was not in writing. I have never at any time made a statement to the contrary.

Second. My sworn testimony in the Bierce trial was true in every minute particular, except as to the section of 200 feet hereinbefore mentioned.

Yours very respectfully,
(Signed)

M. F. SCOTT.

Endorsed: Law 6023. Def't's 6 A. Def't's exhibit 6 A. Law No. 6023. Defendant's Exhibit 6 A. Filed May 13th, 1908. Job Batchelor, Clerk.

287

Law Offices of
Kinney, McClanahan & Cooper,
Judd Building,
Honolulu, Hawaii.

William A. Kinney, Edmund B. McClanahan, Henry E. Cooper,
Charles S. Dole, S. Hasket Derby.

Cable Address, "Hawaii," Honolulu, Lieber's Code.

MAY 27TH, 1904.

Messrs. Cathcart & Milverton, Attorneys for Clinton J. Hutchins,
Trustee, Honolulu.

Re BIERCE
VS.
HUTCHINS.

GENTLEMEN: Your favor of May 26th last was duly received. In Reply to the same we would say that you knew the importance to us

of an early reply to our letter of the 16th last, and we cannot believe that you were unable to consult with your client Mr. Hutchins, so as to make it impossible for you to give us an early reply. Mr. Hutchins has been in town during the whole of that time and we certainly believe that you could have seen him had you wanted to.

As to your purported delivery of the property in question on April 18th last, we refer you to our letters of April 21st and April 26th in regard thereto. We are now prepared to state that the said purported delivery is not acceptable to us, and was not in fact any delivery at all. Last week acting in the best faith possible, and intending to take possession of our property if we could do so, we sent our Mr. Cooper to Kailua, and also sent on the execution issued in the case. The land owners absolutely refused to allow us to remove the rails in question, and we then placed the execution in the hands of Mr. Nahale for the purpose of having the same satisfied. Mr. Nahale was also unable to take the property, and the said execution has this day been returned into Court as unsatisfied.

288 As regards Mr. Scott, we wish to say that he has always held himself out as being the agent of Mr. Hutchins, and we had the right to consider him as such, and we wish further to say that the gentleman from whom we got our information in regard to Mr. Scott's statements is a person in whom we have confidence.

We regret your unwillingness to let us examine the deeds of rights of way or leases of the property in question, and [regret]* your failure to submit the same to us on request as a very significant fact.

Mr. Scott's letter which you enclosed to us merely raises an issue of veracity, on which we do not propose to enter at the present time.

Very truly yours,

(Sig.) KINNEY, McCLANAHAN & COOPER.
Attorneys for William W. Bierce, Ltd.

Endorsed: L. 6023. Def't's exhibit 7. Def't's exhibit 7. Law No. 6023. Defendant's Exhibit 7. Filed May 13, 1908. Job Batchelor, Clerk.

289

Law Offices of
Cathcart and Milverton,
Rooms 5, 6, 7, & 8 Morgan Bldg.,
Kaahumanu St.

Jno. W. Cathcart, Fred. W. Milverton.

Phone, Main 303; Cable Address, "Catha."

HONOLULU, HAWAII, *May 27th, 1904.*

Messrs. Kinney, McClanahan & Cooper, Attorneys for Wm. W. Bierce, Ltd., City.

GENTLEMEN: Replying to your somewhat discourteous letter of this date, we would say that it is immaterial to us what you may be-

lieve in regard to any statement contained in our letter. We take the liberty of doubting your good faith in the so-called attempt to take possession of the property in question, notwithstanding your assertions to the contrary. Permit us also to say that we are satisfied to rely upon Mr. Scott's veracity, although we do not question your right to reply upon that of the unknown gentleman in whom you have confidence. The only significant fact, as we understand it, in our refusal to submit our title deeds to you for inspection bears upon the question of good faith on your part in the premises. As we have long since turned over this property to you under the execution and your demand precisely as we received it, you will pardon us if we were unable to see the great importance of an early reply to your letter of the 16th inst.

We beg to remain,

Yours very truly,

(Signed)

CATHCART & MILVERTON.

Endorsed: Law 6023. Def't's Exhibit 8. Def't's Exhibit 8. Law No. 6023. Defendant's Exhibit 8. Filed May 13th 1908. Job Batchelor, Clerk.

290

Notice.

To Arthur M. Brown, High Sheriff of the Territory of Hawaii; L. A. Andrews, Sheriff of the Island of Hawaii, and J. K. Nahale, Deputy Sheriff of North Kona, Island and Territory of Hawaii:

You will each and all of you please take notice, that on or about April 19th, 1904, C. J. Hutchins, Trustee, in his own behalf, and behalf of those for whom he held, surrendered, delivered and relinquished unto the Attorneys of W. W. Bierce & Co., Ltd., all the rails, rolling stock and other railroad equipment enumerated in a certain judgment, rendered by Hon. J. T. De Bolt, Circuit Judge, First Circuit, Territory of Hawaii, in an action of replevin, wherein W. W. Bierce & Co. Ltd. was plaintiff, and C. J. Hutchins, Trustee, was defendant, said judgment being in favor of plaintiff, and against defendant. Said railroad material and equipment being in the same condition as, and the same situs where, as when the same was purchased by defendant at Receiver's sale of assets of Kona Sugar Co. on May 9th, 1903, and the same condition as, and the same situs where as when, on or about July — 1903, the same was returned to defendant, after having been taken by the High Sheriff, upon defendant's having executed a bond to said High Sheriff for the delivery thereof to plaintiff, should such delivery be adjudged.

At the same date defendant paid to plaintiff's attorneys the sum of \$1198, being the amount of damages fixed in said judgment against defendant for the detention of said property.

Said delivery of property and payment of money damages was made in compliance with a demand made by plaintiff's attorneys, and in pursuance of a Writ of Execution issued out of the Circuit Court, First Circuit. But said delivery of property, and payment of money damages was not a waiver of any of defendant's rights on

appeal at that time made to the Supreme Court, nor was it an admission of plaintiff's title to said property, nor plaintiff's right to said money damages.

291 Since the date of aforesaid delivery, defendant has exercised no rights nor control of said property, and said delivery was actual and effectual, for the purposes hereinbefore set forth and defendant will so warrant and defend same. Said property has not been aliened nor encumbered by defendant. The service of any Writ of Execution on said property, as against defendant, will be a nullity, for the reason that defendant has already fully obeyed the mandate of said writ, and will not be liable for any costs of such service. Service of execution on any other of defendant's property, will be made at the risk of the officer making the same.

The cross ties on which the rails are spiked are the property of defendant, and in removing the rails therefrom, the least possible disturbance in their place and injury thereto must be observed. This notice is served on behalf of C. J. Hutchins, Trustee, and of those for whom he holds.

Endorsed: Copy of Notice served by Scott on Nahale Monday 23 May 1904 10 a. m. on Lands of Ry. at Kona. Defendant's exhibit 9. Defendant's exhibit 9. Law No. 6023. Defendant's Exhibit 9. Filed May 14th, 1908. Job Batchelor, Clerk.

292

Law Offices of
Kinney, McClanahan & Cooper,
Judd Building,
Honolulu, Hawaii.

William A. Kinney, Edmund B. McClanahan, Henry E. Cooper,
Charles S. Dole, S. Hasket Derby.

Cable Address, "Hawaii," Honolulu, Lieber's Code.

SEPTEMBER 30TH, 1904.

Messrs. William Waterhouse and Albert Waterhouse, Executors of the Estate of Henry Waterhouse, Deceased, Honolulu.

GENTLEMEN: On or about September 6th last we forwarded to you a claim on behalf of William W. Bierce Limited against the estate of your testator. We now find that there were certain clerical errors made in the copying of the bond, and desire to correct these by putting in a new claim in place of the old one, and enclosing you with it a certified copy of the bond in question.

We earnestly request that you act promptly in the matter of this claim, and should consider it a favor if you either accept or reject the same today or tomorrow. After your action on the first claim presented there should — no difficulty in deciding what to do about this one.

Very truly yours,
(Signed) KINNEY, McCLANAHAN & COOPER,
Att'ys for William W. Bierce, Ltd.

Endorsed: L. 6023. Defendant's exhibit 10. Defendant's Exhibit 10. Law No. 6023. Defendant's Exhibit 10. Filed May 15th 1908. Job Batchelor, Clerk.

293 For One Dollar (\$1.00) in hand paid by Kapiolani Estate Limited, an Hawaiian corporation, to William W. Bierce, Limited, a foreign corporation, the receipt whereof is hereby acknowledged and by reason of certain other valuable considerations passing to said William W. Bierce Limited, it, the said William W. Bierce Limited, does hereby give to the said Kapiolani Estate Limited, an option to purchase for the sum of \$22,000, United States Gold Coin, all of that certain property as it now is situate on the plantation of the Kona Sugar Company, Limited, at Kailua, Island of Hawaii, mentioned in that certain complaint filed in the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, wherein William W. Bierce Limited is plaintiff, and Clinton J. Hutchins, Trustee, is defendant, the said property being the same covered by judgment had and rendered in said action, (the same having been transferred and tried in the First Judicial Circuit) reference being made to said judgment for a fuller description of said property.

This option is for thirty (30) days from the date when the Kapiolani Estate Limited shall be notified in writing that the option heretofore given by William W. Bierce Limited to Alexander & Baldwin Limited, of Honolulu, is not to be taken up.

And it is expressly understood and agreed that the option herein given to the said Kapiolani Estate Limited is subject to the acceptance of the said option heretofore given to said Alexander & Baldwin Limited, and is absolutely null and void and of no binding force or effect in case the option to said Alexander & Baldwin Limited is accepted by it.

It is also further understood that this option expires absolutely within the time hereinabove named unless on or before such expiration the said sum of \$22,000, is paid to William W. Bierce

294 Limited, or its attorney in fact at the City of Honolulu, Territory of Hawaii.

It is expressly understood and agreed that this option is wholly dependent upon W. W. Bierce Limited being able to secure, without charge to itself, permission, from the proper interested parties, to allow the property covered by this option to remain on the lands where now situate during the life of this option, and if W. W. Bierce Limited shall be unable to secure such permission then this option to be void and of no force and effect, unless said Kapiolani Estate Limited shall choose to bear the expense of removing such portion of said property from the land on which it lies, from the owners of which land permission cannot be secured as above, and in such event the said Kapiolani Estate Limited shall bear the further expense of the care of such property so removed during the life of this option, but such removal shall only be made under the supervision of W. W. Bierce Limited, or its authorized attorney.

Dated Honolulu, Territory of Hawaii, this 14th day of April, A. D. 1904.

WILLIAM W. BIERCE, LIMITED,

(Signed) By S. HASKET DERBY,

Its Attorney in Fact.

Endorsed: Law 6023. Option to Purchase between Kapiolani Estate Limited and William W. Bierce Ltd. Defendants 11. Option. Defendant's exhibit 11. Law No. 6023. Defendant's Exhibit 11. Filed May 19th, 1908. Job Batchelor, Clerk.

295

Law Offices of
Kinney, McClanahan & Cooper,
Judd Building,
Honolulu, Hawaii.

William A. Kinney, Edmund B. McClanahan, Henry E. Cooper,
Charles S. Dole, S. Hasket Derby.

Cable Address, "Hawaii," Honolulu, Lieber's Code.

APRIL 19TH, 1904.

Kapiolani Estate, Limited, City.

GENTLEMEN: We beg to advise you that Messrs. Alexander & Baldwin have declined the option on the railroad equipment which was the subject matter of the judgment rendered in favor of W. W. Bierce Limited against Clinton J. Hutchins, Trustee. The time limit of your option on this property therefore commences to run this day.

Respectfully yours,

KINNEY, McCLANAHAN & COOPER,
(Sig.) E. B. M.
Attorneys for W. W. Bierce, Limited.

Endorsed: Law 6023. Defendant's exhibit 12. Defendant's exhibit 12. Law No. 6023. Defendant's Exhibit 12. Filed May 19th, 1908. Job Batchelor, Clerk.

296 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii.

At Chambers. In Equity.

M. W. McCHESNEY & SONS, Plaintiff,

vs.

KONA SUGAR CO. LTD., and FIRST AMERICAN SAVINGS & TRUST CO.
OF HAWAII, LTD., Trustee, Defendants.

Petition of M. F. Scott, Receiver, for Order Fixing Priority of Payment of Claims of Creditors.

To the Honorable W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, sitting at Chambers in Equity:

Your petitioner, M. F. Scott, Receiver, respectfully represents and shows to this Honorable Court as follows:

First. That petitioner is the duly appointed and qualified receiver of the Kona Sugar Co. Ltd., acting under and by virtue of an order of this Honorable Court made in the above entitled cause on the 28th day of March, 1902.

Second. That a large majority of the creditors of the Kona Sugar Co. Ltd., have entered into an agreement under the terms of which Mr. S. M. Damon, Mr. Cecil Brown and Mr. J. F. Humburg were appointed and are now a Committee representing the interests of said creditors in relation to their several claims against the said company. A copy of which said agreement being hereto attached marked Exhibit "A," referred to and made part of this petition.

Third. That under and by virtue of the authority given to
297 said Damon, Brown and Humburg by said agreement they have, as such Committee and acting for said creditors, parties to said agreement, signified their consent that your petitioner, upon securing the proper authority from this Honorable Court, may sell the sugars manufactured at the mill of the said Kona Sugar Co. Ltd., and made disposition of the proceeds of such sale or sales in the manner and priority as the same is set forth in said consent, a copy of which is hereto attached marked Exhibit "B," referred to and made part hereof.

Fourth. That your petitioner believes it to be to the best interests of all interested parties and necessary in order to pay the claims held against said Kona Sugar Co. Ltd. that the cane crop for the year 1903 be cultivated, cared for, harvested and manufactured into sugar and that at least five hundred (500) acres, but not more than one thousand (1000) acres of the land of said Company be prepared and planted for the cane crop of 1904 which, in order to accomplish matters which are for the best interests of said Company, its creditors and stockholders, should be cultivated, cared for, harvested and manufactured into sugar.

Fifth. That your petitioner believes it to be for the best interests of all interested parties that payment of claims against said Kona Sugar Co. Ltd., be made in the priority named in said Exhibit "B."

Wherefore petitioner prays that an order issue out of this Honorable Court empowering and directing this petitioner, as receiver of the Kona Sugar Co. Ltd., to cultivate, care for, harvest and manufacture a sugar cane crop of said Company for the year 1903 and prepare and plant a crop of not less than five hundred (500) acres nor more than one thousand (1000) acres for the year 1904, and cultivate, care for, harvest and manufacture the sugar therefrom.

And upon making sales of such sugars so to — manufactured.
298 from the proceeds thereof to at all times pay and keep paid the necessary expenses or carrying on the plantation and operating the mill of the said Company situate thereon, including the expenses for rent, taxes, wages, salaries and necessary supplies and repairs, applying the surplus:

(1) To or towards the payment of the sum or sums now due to labor contractors and employees of the Company, on labor contracts and for back labor, until the entire liquidation of such indebtedness:

(2) To or towards the payment of L. M. Whitehouse and L. Vas-

concedes in full for moneys due or to grow due under their respective railroad contracts with the said Kona Sugar Co. Ltd., and of Albert Horner for royalties for the use of said Horner's patent cable carrier, until such indebtedness is completely liquidated;

(3) To or towards the payment of rent now due the several lessors of the Kona Sugar Co. Ltd., and government taxes, until such indebtedness is completely liquidated;

(4) To or towards the payment of the amount of the claims of skilled mechanics and material men who have filed or may file liens against the property of the said Kona Sugar Co. Ltd., until such indebtedness is completely liquidated;

(5) To or towards the payment of the amount of the claims of general creditors of the Kona Sugar Co. Ltd., and the interest at the time due on the bonds of the Kona Sugar Co. Ltd. until such indebtedness is completely liquidated.

Said surplus moneys to be paid to the several creditors composing the foregoing classes pro rata and in proportion to the amount of their respective claims.

And your petitioner will ever pray.

Dated this 20th day of May, 1902.

(Signed)

M. F. SCOTT.

299 TERRITORY OF HAWAII,
Island of Hawaii:

M. F. Scott being duly sworn deposes and says that he is the petitioner in the above cause, that he has read the same and knows the contents thereof, that the allegations there contained are true, except wherever stated to be on information, and that he believes the same to be true.

(Signed)

M. F. SCOTT.

Subscribed and sworn to before me this 21st day of May, A. D. 1902.

(Signed)

[SEAL.]

J. P. CURTS,

Clerk 3rd Circuit Court.

300

EXHIBIT "A."

Whereas in a suit in equity brought in the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, before the Honorable W. S. Edings, at Chambers in Equity, by M. W. McChesney & Sons against the Kona Sugar Co. Ltd., and the First American Savings and Trust Co. of Hawaii, Limited, trustee; one M. F. Scott was appointed receiver of the defendant the Kona Sugar Co. Ltd. and is at this time acting as such receiver, and

Whereas the persons, firms, and corporations signing this agreement, parties hereto, are creditors of the said Kona Sugar Co. Ltd., and are desirous of acting in harmony and unison in the carrying out of a general plan under which the affairs and business of the said Kona Sugar Co. Ltd., under the management of the said receiver,

shall be so conducted as to work to the best interests of all parties hereto, and

Whereas it is recognized and appreciated by the parties hereto that under the circumstances now existing unity and harmony of action on the part of the creditors of said company will alone secure the payment of all claims against the said Company, and

Whereas this agreement has in view the continuance of the business of the said Company and the speedy liquidation and settlement without further litigation of all claims held by creditors, both secured and unsecured, against the said Kona Sugar Co. Ltd.,

Now therefore this agreement, made and entered into this 15th day of May, A. D. 1902, by and between the bondholders, lessors, lienholders and general creditors, both secured and unsecured, of the Kona Sugar Co. Ltd.;

Witnesseth:

That for and in consideration of the mutual covenants herein contained the parties hereto who are the holders of the bonds of the Kona Sugar Co., Ltd. and the parties hereto who are the lessors
301 of the Kona Sugar Co. Ltd., and the parties hereto who are creditors of the Kona Sugar Co. Ltd., and hold mechanic's and material man's liens against the property of the Kona Sugar Co. Ltd. and the parties hereto who are general creditors, both secured and unsecured, of the Kona Sugar Co. Ltd., agree and covenant, each with the others, as follows, that is to say:

That S. M. Damon, Cecil Brown, [J. F. H.]* and J. F. Humburg, all of the city of Honolulu, are hereby appointed a committee advisory and of inspection on behalf of all the parties hereto of the business and affairs of the Kona Sugar Co. Ltd., and of the management and conduct of said business and affairs by the said receiver.

That this Committee, under authority of this agreement, is given power and is directed to enter into such an agreement, contract or stipulation as to them may seem appropriate with the said M. F. Scott, receiver of the said Kona Sugar Co. Ltd., or his successor or successors in office, or to consent to such an order in the said suit under and by virtue of which agreement, contract, stipulation or order said receiver is to make sales of the sugars to be manufactured by him as receiver and from the proceeds therefrom to at all times pay and keep paid the necessary expenses of carrying on the plantation and operating the mill of the said Company situate thereon, including the expenses for rent, taxes, wages, salaries, necessary supplies and repairs, applying the surplus:

(1) To or towards the payment of the sum or sums now due to labor contractors and employees of the Company, on labor contracts and for back labor, until the entire liquidation of such indebtedness;

(2) To or towards the payment of L. M. Whitehouse and L. Vasconcelles in full for moneys due or to grow due under their respective railroad contracts with the said Kona Sugar Co.
302 Ltd., and of Albert Horner for royalties for the use of said Horner's patent cable carrier, until such indebtedness is completely liquidated;

[* Words enclosed in brackets erased in copy.]

(3) To or towards the payment of rent now due the several lessors of the Kona Sugar Co. Ltd., and government taxes, until such indebtedness is completely liquidated;

(4) To or towards the payment of the amount of the claims of skilled mechanics and material men who have filed or may file liens against the property of the said Kona Sugar Co. Ltd. until such indebtedness is completely liquidated;

(5) To or towards the payment of the amount of the claims of general creditors of the Kona Sugar Co. Ltd., and the interest at the time due on the bonds of the Kona Sugar Co. Ltd. until such indebtedness is completely liquidated.

Provided however, that as between the parties comprising each one of the classes aforesaid, they shall be entitled to and shall be paid, such share of the surplus moneys in the hands of the receiver pro rata and in proportion to their respective claims.

That such consent as is hereinbefore directed to be given is to be upon the condition that the said receiver is to cultivate, care for, harvest and manufacture the sugar from the sugar cane crop of the said Company for the year 1903, and to prepare and plant a crop of not less than five hundred (500) acres and not more than One Thousand (1,000) acres, for the year 1904, and cultivate, care for, harvest and manufacture sugar therefrom.

It is also mutually understood and agreed that the powers and duties of the said Committee herein provided for and appointed shall be to examine and inspect from time to time the condition of the plantation of the said Kona Sugar Co. Ltd., and to inspect and supervise the conduct and management by the said receiver of the business and affairs of the said Company and to report thereon. To this end

303 said Committee is authorized, empowered and directed to select and employ a competent man, who shall be paid a salary of not to exceed fifty dollars (\$50) per month by the signatories to this agreement, (each party paying an amount pro rata to the amount of their several and individual claims against the said Company) who shall report to the said Committee.

Said Committee to have power, and is hereby directed, to organize by the selection of a Chairman, Secretary and Treasurer and hold stated meetings. And it is agreed that any member of said Committee resigning his place as said Committeeman, may appoint any person as his successor provided such appointment be with the approval of the remaining two members of the Committee, and such new appointee and successor shall have all the powers under this agreement conferred on any of the members named herein.

It is also further understood and mutually agreed that so long as this agreement shall remain in force the lawful and authorized acts and doing of said Committee hereunder, when made by a majority of its members, shall be binding and effective as against the respective parties hereto.

It is further mutually agreed and understood that any of the parties hereto shall be at liberty to withdraw from this agreement at any time hereafter by giving written notice of his or its withdrawal to the Chairman of said Committee, and thereupon such person shall be free from further liability hereunder, but such withdrawal so made

shall in nowise affect the binding force and obligation resting upon the remaining parties hereto, and Provided that no withdrawal of any of the parties hereto shall in anywise affect the acts and things done hereunder prior to such withdrawal. It being mutually understood and agreed that all such acts and things done prior to such withdrawal are binding upon the party so withdrawing.

It is also mutually understood and agreed that the entering into this contract shall under no circumstances and in no event be
 304 deemed a waiver or a denial of the right of the several parties to intervene in the aforesaid suit against the said Kona Sugar Co. Ltd. for any cause or causes or to withdraw herefrom without liability, or give the said Committee the right to pledge the credit of the said parties hereto except for his, their or its pro rata share of the expenses authorized herein, and that said Committee has no authority to bind the parties hereto or any one of them by contract or otherwise, to an acquiescence in any of the acts or doings of the said M. F. Scott as such receiver, except as set forth and contained in these presents.

Provided however that nothing herein contained shall be deemed a waiver by any of the parties hereto of their rights as holders of liens against the Kona Sugar Co. Ltd., or the assets thereof or shall bar them from instituting such legal proceedings as by statute it shall be incumbent upon them to institute to protect and preserve such liens.

Provided further that nothing herein contained shall be construed to constitute the parties hereto partners or that these presents constitute articles creating a partnership.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

[SEAL.] THE FIRST AMERICAN SAVINGS &
TRUST CO. OF HAWAII, LTD.,

By Its President, CECIL BROWN.

[SEAL.] THE FIRST NATIONAL BANK OF HA-
WAI, AT HONOLULU,

By Its President, CECIL BROWN.

BISHOP & CO.

[SEAL.] M. W. McCHESNEY & SONS.
H. HACKFELD & CO., LIM'D.
J. F. HUMBURG, *Director*,
WILLIAM W. BIERCE, LTD.,

By KINNEY, BALLOU & McCLANAHAN,

Its Attorneys.

305 KAPIOLANI ESTATE, LTD., [SEAL.]
Lessor of Mill Site.

Per JOHN F. COLBURN, *Treasurer*.

CASTLE & COOKE, LTD.,

E. D. TENNEY, *Secretary*.

C. BREWER & COMPANY, LTD.,

By GEO. H. ROBERTSON, *Manager*. [SEAL.]
OOKALA SUGAR PLANT'N CO.,

By Its Treas'r, GEO. H. ROBERTSON.

A. HORNER, [SEAL.]
 By H. HACKFELD & CO., LTMD.,
 By J. F. HUMBURG, *Director*.
 S. C. ALLEN.
 REV. E. MAYNARD.
 RISON IRON WORKS,
 By E. P. JONES.
 E. C. GREENWELL,
 By FRANK E. GREENWELL.
 FRANK HUSTACE.
 JOS. KOSICK,
 BAKER & HAMILTON,
 By C. F. TEAFF.
 JOHN D. PARIS.
 W. H. SHIPMAN,
 W. H. JOHNSON,
 J. D. JOHNSON,
 MRS. E. ROY,
 Per J. D. PARIS.
 MRS. HANNAH PARIS,
 Per J. D. PARIS.
 SOUTH KONA AGRI. CO., LTD.,
 By Its Treasurer, A. N. CAMPBELL. [SEAL.]
 HAW'N NAVIGATION CO., LTD.,
 By Its Treasurer, A. N. CAMPBELL. [SEAL.]
 L. M. WHITEHOUSE,
 By ROBERT HAWXHURST,
 His Attorney in Fact.
 L. VASCONCELLES.
 M. F. SCOTT.
 JAS. COWAN.

EXHIBIT "B."

To M. F. Scott, Receiver of the Kona Sugar Co., Ltd., Kailua, Hawaii.

DEAR SIR: Under and — virtue of the power and direction contained and set forth in an agreement made between certain creditors of the Kona Sugar Co. Ltd., dated May 15th, 1902, a copy of which agreement is hereby attached and referred to, we, the members of the Committee provided for in said agreement, as a Committee, and for and on behalf of the signatories to said agreement, do by this letter give to you as the receiver of the Kona Sugar Co. Ltd., our consent to (under proper order of Court) make sales of the sugars to be manufactured by you as the receiver of said Company and from the proceeds of such sales to at all times pay and keep paid the necessary expenses of carrying on the plantation and operating the mill of the said Company situate thereon, including the expenses for rent, taxes, wages, salaries and necessary supplies and repairs, applying the surplus:

(1) To or towards the payment of the sum or sums now due to labor contractors and employees of the Company, on labor contracts and for back labor, until the entire liquidation of such indebtedness;

(2) To or towards the payment of L. M. Whitehouse and L. Vasconcelles in full for moneys due or to grow due under their respective railroad contracts with the said Kona Sugar Co. Ltd., and of Albert Horner for royalties for the use of said Horner's patent cable carrier, until such indebtedness is completely liquidated;

(3) To or towards the payment of rent now due the several lessors of the Kona Sugar Co. Ltd. and government taxes, until such indebtedness is completely liquidated;

(4) To or towards the payment of the amount of the claims of skilled mechanics and materialmen who have filed or may file liens against the property of the said Kona Sugar Co., Ltd., until
307 such indebtedness is completely liquidated;

(5) To or towards the payment of the amount of the claims of general creditors of the Kona Sugar Co. Ltd., and the interest at the time due on the bonds of the Kona Sugar Co. Ltd. until such indebtedness is completely liquidated.

Such surplus moneys to be paid to the several creditors composing the foregoing classes pro rata and in proportion to the amount of their respective claims.

This consent, however, being given upon the express condition that you obtain an order of Court directing, authorizing and empowering you to so make sales and so apply the receipts therefrom and provided further that such order directly authorizes and empowers you as such receiver of the Kona Sugar Co. Ltd., to cultivate, care for, harvest and manufacture a sugar cane crop of said company for the year 1903 and prepare and plant a crop of not less than five hundred (500) acres nor more than one thousand (1000) acres for the year 1904 and cultivate, care for, harvest and manufacture the sugars therefrom.

By reference to the attached copy of the agreement under which this Committee is acting in the premises you will be advised of the limitation of our power and authority to bind the parties thereto.

Respectfully yours,

S. M. DAMON.

By S. E. DAMON.

CECIL BROWN.

J. F. HUMBURG.

Committee Representing Creditors of the Kona Sugar Co., Ltd., under Agreement of May 15, 1902.

Dated Honolulu, T. H., May 16th, A. D. 1902.

Endorsed: Circuit Court, Third Circuit. M. W. McChesney & Sons vs. Kona Sugar Co. Ltd. et al. Petition of M. F. Scott. Filed May 20, 1902. J. P. Curts, Clerk. Kinney, Ballou & McClanahan, Judd Bldg. 9. Put in for identification by Defendant & known as No. 9 having been identified are now offered in evidence counsel for plaintiff objecting. Court sustained the objection. Job Batchelor, Cl'k. May 14/08. (Judiciary Department Stamp dated May 8, 1908.)

308 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii. In Equity.

At Chambers.

M. W. McCHESNEY & SONS, Plaintiff,

vs.

KONA SUGAR CO., LTD., and FIRST AMERICAN SAVINGS & TRUST CO. OF HAWAII, LTD., Trustee, Defendants.

Order.

M. F. Scott, temporary receiver of the Kona Sugar Co. Ltd., having filed and presented to this Court a petition praying to be authorized, empowered and directed to cultivate, care for, harvest and manufacture a sugar cane crop for the said Kona Sugar Co. Ltd., for the year 1903, and prepare and plant a crop of not less than five hundred acres nor more than one thousand acres for the year 1904, and cultivate, care for, harvest and manufacture the sugars therefrom, and for authority and direction to make sales of said sugars and from the proceeds of such sales to at all times pay and keep paid the necessary expenses of carrying on the plantation of the said Kona Sugar Co. Ltd., and operating the mill of the said Company situate thereon, including the expenses for rent, taxes, wages, salaries and necessary supplies and repairs, and for authority and direction to apply the surplus from such sales:

(1) To or towards the payment of the sum or sums now due to labor contractors and employees of the Company, on labor contracts and for back labor, until the entire liquidation of such indebtedness.

309 (2) To or towards the payment of L. M. Whitehouse and L. Vasconcelles in full for moneys due or to grow due under their respective railroad contracts with the said Kona Sugar Co. Ltd., and of Albert Horner for royalties for the use of said Horner's patent cable carrier, until such indebtedness is completely liquidated;

(3) To or towards the payment of rent now due the several lessors of the Kona Sugar Co. Ltd., and government taxes, until such indebtedness is completely liquidated;

(4) To or towards the payment of the amount of the claims of skilled mechanics and material men who have filed or may file liens against the property of the said Kona Sugar Co. Ltd., until such indebtedness is completely liquidated;

(5) To or towards the payment of the amount of the claims of general creditors of the Kona Sugar Co. Ltd., and the interest at the time due on the bonds of the Kona Sugar Co. Ltd., until such indebtedness is completely liquidated.

All of which will more fully appear from said petition, and the consent of the creditors and bondholders of said Kona Sugar Co. Ltd., having been shown and the Court being fully advised in the premises, and this Court believing it to be to the best interests of the said Kona Sugar Co. Ltd., and all interested parties, it is hereby Or-

dered and Decreed that M. F. Scott, temporary receiver of the Kona Sugar Co. Ltd., be, and he hereby is, authorized, empowered and directed to cultivate, care for, harvest and manufacture a sugar cane crop of the Kona Sugar Co. Ltd., for the year 1903 and prepare and plant such a crop for said Company of not less than five hundred (500) acres nor more than one thousand (1000) acres for the year 1904, and cultivate, care for, harvest and manufacture the sugars therefrom.

And the said M. F. Scott, temporary receiver of said Kona Sugar Co. Ltd., is further Ordered and Directed to make sales of such sugars as shall be so manufactured such sales to be in accordance with an order of this Court issued on the 28th day of April, 1902
310 and from the proceeds of such sale or sales to at all times pay and keep paid the necessary expenses of carrying on the plantation of the said Kona Sugar Co. Ltd., and operating the mill of the said Company situate thereon, including the expenses for rent, taxes, wages, salaries and necessary supplies and repairs, and said M. F. Scott, temporary receiver of said Kona Sugar Co. Ltd., is hereby ordered and directed, after the payment of said necessary expenses, to apply the surplus from any such sale or sales in the following order of priority:

(1) To or towards the payment of the sum or sums now due to labor contractors and employees of the Company, on labor contracts and for back labor, until the entire liquidation of such indebtedness:

(2) To or towards the payment of L. M. Whitehouse and L. Vasconcelles in full for moneys due or to grow due under their respective railroad contracts with the said Kona Sugar Co. Ltd., and of Albert Horner for royalties for the use of said Horner's patent cable carrier, until such indebtedness is completely liquidated:

(3) To or towards the payment of rent now due the several lessors of the Kona Sugar Co. Ltd., and government taxes, until such indebtedness is completely liquidated:

(4) To or towards the payment of the amount of the claims of skilled mechanics and material men who have filed or may file liens against the property of the said Kona Sugar Co. Ltd., until such indebtedness is completely liquidated:

(5) To or towards the payment of the amount of the claims of general creditors of the Kona Sugar Co. Ltd., and the interest at the time due on the bonds of the Kona Sugar Co. Ltd., until such indebtedness is completely liquidated:

And it is further Ordered and Decreed that in the payment of the several parties comprising the several classes aforesaid the said receiver shall pay from such surplus moneys as aforesaid the said
311 several claims of the classes aforesaid pro rata and in proportion to the amount of their respective claims.

(Signed)

W. S. EDINGS.

*Judge of the Circuit Court of the Third
Judicial Circuit, Territory of Hawaii,
Sitting at Chambers, in Equity.*

Dated May 21, 1902.

Endorsed: Circuit Court, Third Circuit. M. W. McChesney & Sons vs. Kona Sugar Co. Ltd., et al. Order. Filed May 21, 1902. J. P. Curts, Clerk. 10. Put in for identification by Defendant & known as No. 10 having been identified *are* now offered in evidence. Counsel for Plaintiff objecting. Court sustained the objection. Job Batchelor, Clerk. May 14/08. (Judiciary Department Stamp dated May 8, 1908.)

312 *Whereas*, in an action of replevin brought by William W. Bierce Limited vs. Clinton J. Hutchins, Trustee, for the recovery of certain railroad property and equipment at the plantation of the Kona Sugar Company, Limited, at Kailua, on the Island of Hawaii, tried before the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit, jury waived, the plaintiff recovered a judgment for the possession of said property and all thereof mentioned in the complaint filed in said action; and,

Whereas, an order for execution on said judgment has issued in conformity with Section- 17 and 19 of Act 32 of the Laws of 1903; and

Whereas, certain of said property is now on certain lands at said Kailua owned by the Kapiolani Estate Limited, and,

Whereas, said Kapiolani Estate Limited makes claim to said certain portions of said property;

Now therefore this instrument witnesseth: That for One Dollar (\$1.00) in hand paid by William W. Bierce Limited, a foreign corporation, to Kapiolani Estate Limited, an Hawaiian corporation, the receipt whereof is hereby acknowledged, and by reason of certain other valuable considerations passing to the said Kapiolani Estate Limited, it, the said Kapiolani Estate Limited does release and waive all right, title, interest or claim which it now has, or claims to any and all of the property described and mentioned in the complaint in replevin filed in that certain action brought by William W. Bierce Limited vs. Clinton J. Hutchins, Trustee, referred to above herein, and said Kapiolani Estate Limited does hereby give permission and grant the right to the said William W. Bierce Limited, or its agent or agents, to enter upon its said land at Kailua for the purpose of taking possession of, and in its option, removing said property.

313 *Witness* the signature and seal of said Kapiolani Estate Limited, by its President, David Kawananakoa, and its Treasurer John F. Colburn, at Honolulu Territory of Hawaii, this 14th day of April A. D. 1904.

KAPIOLANI ESTATE, LIMITED,

By ———, *Its President.*

By ———, *Its Treasurer.*

Endorsed: "Copy." Surrender of Rails to W. W. Bierce & Co. Put in for identification by Defendants. No. 22. 2 Parts.

314 On the 13th day of July, A. D. 1909, in the October Term of said Supreme Court of the year 1908, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

315 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

Clerk's Minutes.

Vol. 3, p. 118.

TUESDAY, July 13, 1909.

Court convened at 10:20 o'clock A. M.

Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. Antonio Perry, JJ.

S. C., No. 434.

To Page 139.

WILLIAM W. BIERCE, LTD.,

v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Last Will and of the Estate of Henry Waterhouse, Deceased.

Error to Circuit Court, First Circuit.

Assumpsit.

Appearances:

A. G. M. Robertson for Plaintiff-Appellant.

A. Lewis Jr., of the firm of Smith & Lewis and W. A. Greenwell of the firm of Castle & Withington for Defendants-Appellees.

Upon convening of the Court the Chief Justice said, "the Court will hear what counsel have to say," and thereupon the following proceedings were had.

Mr. Robertson counsel for the plaintiff said: "If the Court please in the case of Bierce Limited versus Waterhouse, counsel have signed a stipulation for the entry of a pro forma judgment affirming the judgment of the lower court, which I ask leave to file, and in that connection would ask leave also to withdraw the brief heretofore filed for the plaintiff in error."

316 Mr. Lewis counsel for the defendants said, "I consent to the motion of counsel to withdraw the brief heretofore filed in this action by him and to the filing of the stipulation, but as to the form of the judgment presented to be entered by the clerk, I neither consent nor object to it."

Mr. Greenwell of counsel for the defendants said, "I also join in the consent."

The COURT: The judgment in form as presented by counsel for the plaintiff has been shown to the counsel for the defendants who make no objection to the form while not consenting to it. The brief of the plaintiff may be withdrawn, counsel for the defendants consenting and the pro forma judgment may be entered.

At 10:24 o'clock A. M. the Court adjourned until 10 o'clock next Monday morning, July 19.

J. A. THOMPSON,
Clerk Supreme Court.

317 Thereafter on the 13th day of July, A. D. 1909, a stipulation was filed in the clerk's office of said Supreme Court, which said stipulation was thereafter, to wit, on the 3rd day of August, A. D. 1909, withdrawn from the said clerk's office, and a receipt therefor filed in said clerk's office, which said receipt is in the words and figures following, to wit:

318 Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,

v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors, &c.,
Defendants in Error.

Receipt for Papers Withdrawn.

Received of the Clerk, the following Papers, filed in the above Case:

Stipulation of the parties filed on July 13, 1909, withdrawn pursuant to order of Court made August 3rd, 1909.

.....	Recorded Lib.....	fol.....
.....	" "	"
.....	" "	"
.....	" "	"

Hawaiian Registry of Conveyances Aug. 3rd, 1909.

(Signed)

A. G. M. ROBERTSON,
Att'y for Plaintiff.

Endorsed: Supreme Court. Bierce v. Waterhouse. Receipt for Papers Withdrawn. Filed August 3rd, 1909. Henry Smith, Clerk.

319 On the same day, to wit, the 13th day of July, A. D. 1909, a judgment was entered and filed in the clerk's office of said Supreme Court, which said judgment is in the words and figures following, to wit:

320 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

WILLIAM W. BIERCE, LIMITED, Plaintiff-in-Error,
VS.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants-in-Error.

Error to Circuit Court, First Circuit.

Judgment.

The above entitled cause having come before this Court upon a writ of error directed to the Circuit Court of the First Judicial Circuit, issued at the instance of said William W. Bierce, Limited, plaintiff-in-error, and the parties to said cause having this day, by stipulation dated and filed this 13th day of July, 1909, stipulated that the judgment sought to be reviewed should be affirmed pro forma;

It is ordered and adjudged by this Court that the judgment entered in the Circuit Court of the First Judicial Circuit, on the 29th day of May, A. D. 1909, in that certain action of assumpsit wherein William W. Bierce, Limited, was plaintiff, and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, were defendants, whereby it was adjudged that, notwithstanding the verdict in said cause, the plaintiff should take nothing by its writ, and that the defendants

321 recover of and from the plaintiff their costs taxed at the sum of \$1097.22 be and the same is hereby affirmed, with costs taxed to the plaintiff-in-error.

By the Court:

(Signed)

[SEAL.]

J. A. THOMPSON, Clerk.

Entered this 13th day of July, A. D. 1909.

Endorsed: No. 434. Supreme Court Territory of Hawaii. October Session, 1909. William W. Bierce, Limited, Pl'tff-in-Error, vs. William Waterhouse, et al., Def'ts-in-Error. Judgment. Filed July 13, 1909, at 10:20 o'clock A. M. J. A. Thompson, Clerk.

322 Thereafter, to wit, on the 2nd day of August, A. D. 1909, a stipulation was filed in the clerk's office of said Supreme Court, which said stipulation is in the words and figures following, to wit:

323 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff-in-Error,

vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants-in-Error.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the stipulation of said parties consenting to the entry of a pro forma judgment in said cause filed in the above entitled court on the 13th day of July, 1909, may be withdrawn from the files of said cause, and that the judgment made and entered therein on said 13th day of July, 1909, affirming the judgment of the First Circuit Court be vacated and

and that an order to that effect be forthwith entered herein;

S. & L. set aside; and also that defendants-in-error shall have

A. G. M. R. until September 1st, 1909, to file their brief herein, and to file such motion or motions, and to take such

other action as they may be advised; also that no hearing shall be had in said cause until the return of Chief Justice Hartwell.

Dated August 2nd, 1909.

(Signed)

A. G. M. ROBERTSON,

Attorney for Plaintiff-in-Error.

(Signed)

SMITH & LEWIS,

(Signed)

CASTLE & WITHINGTON,

(Signed)

J. W. CATHCART,

Attorneys for Defendants-in-Error.

324 The foregoing Stipulation is hereby approved.

(Signed)

ANTONIO PERRY,

Justice Supreme Court.

Endorsed: No. 434. Supreme Court, Territory of Hawaii. William W. Bierce, Limited, Plaintiff-in-Error, vs. William Waterhouse, et al., Ex'rs, Defendants-in-Error. Stipulation. Filed at 3:15 P. M. August 2, 1909. Henry Smith, Clerk.

325 Thereafter, to wit, on the 3rd day of August, A. D. 1909, an order of the Supreme Court of the Territory of Hawaii was made and entered and filed in the clerk's office of said Supreme Court, which said order is in the words and figures following to wit:

326 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

WILLIAM W. BIERCE, LIMITED, Plaintiff-in-Error,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants-in-Error.

Order.

Pursuant to the stipulation of the parties to the above entitled cause filed in this Court on August 2nd, 1909, the stipulation of said parties consenting to the entry of a pro forma judgment herein, filed herein on July 13th, 1909, is hereby allowed to be withdrawn from the files of said cause, and the judgment entered on said stipulation in said court and cause on said 13th day of July, 1909, is hereby vacated, annulled and set aside; and it is further ordered that the provisions of said stipulation of August 2nd, 1909, in regard to filing briefs, motions and other matters by the defendants-in-error are hereby approved and allowed, and that the hearing of such matters stand continued till the return of Chief Justice Hartwell.

By the Court:
(Signed)

HENRY SMITH, *Clerk.*

Dated August 3d, 1909.

O. K.
S. & L.
C. & W.
J. W. C.
L.

[On Margin.]

Said stipulation of July 13, 1909, withdrawn from the files by plaintiff's attorney August 3rd, 1909.
(Signed)

HENRY SMITH,
Clerk Supreme Court.

Endorsed: No. 434. Supreme Court, Territory of Hawaii, October Term, 1908. William W. Bierce, Limited, Plaintiff-in-Error, vs. William Waterhouse, et al., Ex'rs, Defendants-in-Error. Order. Filed at 10:30 A. M. August 3, 1909. Henry Smith, Clerk.

327 Thereafter, on the 1st day of September, A. D. 1909, came the defendants-in-error in said cause in said Supreme Court of the Territory of Hawaii, by their attorneys and filed in the clerk's office — said Supreme Court their motion to quash said writ of error, which said motion is in the words and figures following, to wit:

328 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Error to the Circuit Court, First Circuit.

Motion to Quash Writ of Error.

Now come the defendants in the above entitled cause, and move to quash the writ of error in this cause, on the following grounds:

I.

That the writ of error brings up no proceedings subsequent to the mandate from this court directing an entry of judgment, and that the said writ of error seeks to review proceedings in the Circuit Court done in exact accordance with the mandate of this court.

II.

That the judgment of this court rendered May 5, 1909, ordering judgment *non obstante veredicto* for these defendants is a final and conclusive adjudication, binding on the plaintiff in this action.

III.

That no appeal having been taken by the plaintiff from the judgment of this court rendered May 5, 1909, that judgment is a final and conclusive decision against the plaintiff and decisive of this action.

329

IV.

That the judgment of this court rendered May 5, 1909, and the opinion of the court thereon filed April 12, 1909, is the law of this case, binding upon the plaintiff and decisive of the questions herein.

V.

That the record in this case does not present the record upon which the decision of this court ordering a judgment *non obstante veredicto* rendered May 5, 1909, was based, but only presents a part of the record, and that it is impossible for this court to review upon the record now before the court the case as presented upon exceptions to this court in which said judgment was rendered.

VI.

That the said record does not include all the pleadings, motions, notes or bill of exceptions, exhibits, the clerk's or magistrate's notes of proceedings, or a transcript of the evidence in the case and particularly that it does not include the bill of exceptions before the court when said judgment was rendered.

VII.

That the said record does not contain the rulings of the court on the admission or rejection of evidence when excepted to, nor the rulings of the court upon instructions to the jury when excepted to.

Dated, August 31, A. D. 1909.

(Signed)

SMITH & LEWIS,

(Signed)

J. W. CATHCART,

(Signed)

CASTLE & WITHINGTON,

Attorneys for Defendants.

Endorsed: Original. No. 434. Supreme Court Territory of Hawaii. October Term, 1908. William W. Bierce, Limited, a corporation, Plaintiff, vs. William Waterhouse and Albert Waterhouse, Executors, Defendants. Motion to Quash Writ of Error. Receipt of a copy of the within Motion is hereby admitted this first day of September, 1909. A. G. M. Robertson, Attorney for Plaintiff. Filed Sept. 1, 1909, at 2:50 P. M. J. A. Thompson, Clerk. Castle & Withington, Attorneys for Defendants.

330 Thereafter, to wit, on the 27th day of September, A. D. 1909, an appearance and consent to substitution were filed in the clerk's office of said Supreme Court, which said appearance and consent to substitution are in the words and figures following, to wit:

331 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

WILLIAM W. BIERCE, LTD., Plaintiff-in-Error,

vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the — and of the Estate of Henry Waterhouse, Deceased, Defendants-in-error.

Appearance.

The undersigned hereby appear as attorneys for the above-named plaintiff-in-error in the above entitled cause.

Dated, Honolulu, Sept. 27, 1909.

(Signed)

HOLMES, STANLEY & OLSON,
Attorneys for William W. Bierce, Ltd.,

Plaintiff-in-Error.

Consent to Substitution.

The undersigned hereby consents that Messrs. Holmes, Stanley & Olson be substituted in his place as attorneys for the above-named plaintiff-in-error in the above entitled cause.

Dated, Honolulu, Sept. 27, 1909.

(Signed)

A. G. M. ROBERTSON,
Attorney for said Plaintiff-in-Error.

Endorsed: No. 434. In the Supreme Court of the Territory of Hawaii, October Term, 1908. William W. Bierce, Ltd., Plaintiff-in-Error, vs. William Waterhouse, et al., Executors, etc. Defendants-in-Error. Appearance and Consent to Substitution. Filed September 27, 1909, at 11:30 o'clock A. M. J. A. Thompson, Clerk. Holmes, Stanley & Olson, Kaahumanu St. Honolulu, Attorneys for Plaintiff-in-Error.

332 On the 27th day of September, A. D. 1909, in the October Term of said Supreme Court of the year 1908, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

333 Vol. 3, p. 139.

MONDAY, Sep. 27, 1909.

Court convened at 10 o'clock A. M.

Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder, and Hon. Antonio Perry, JJ.

S. C., No. 434.

From page 118
To " 143.

WILLIAM W. BIERCE, LIMITED,
v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will of Henry Waterhouse, Deceased.

Error to Circuit Court, First Circuit.

Appearances:

D. L. Withington and A. Lewis, Jr., for Defendants-Appellees.

D. L. Withington, Esq., one of the attorneys for the defendants in the above entitled cause being present in Court stated to the Court that he was going away and that they were desirous of having the motion in said case disposed of, and asked that said motion be set for next Thursday for argument, adding that Mr. Olson who has

been substituted as counsel for the plaintiff wants a few days to prepare, and in conclusion he stated that upon disposition of the motion it is agreeable to counsel that the case be submitted on the briefs.

Mr. A. Lewis, Jr., who also appears for the defendants, remarked that Thursday morning was satisfactory to him for the hearing of the motion and requested that it be set for that date.

Mr. Olson who was present in Court acquiesced in to the setting of the motion for next Thursday morning.

334 The Court ordered that the motion herein be set for Thursday next for argument, Sept. 30.

J. A. THOMPSON,
Clerk Supreme Court.

335 On the 30th day of September, A. D. 1909, in the October Term of said Supreme Court of the year 1908, in the record of the proceedings in said entitled cause, appears the following entry, to wit:

336 Vol. 3, p. 143.

THURSDAY, Sep. 30, 1909.

Court convened at 10 o'clock A. M.

Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder, and Hon. Antonio Perry, JJ.

S. C., No. 434.

From page 139

To " 146.

WILLIAM W. BIERCE, LTD.,

v.

WILLIAM WATERHOUSE et al., Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Error to Circuit Court, First Circuit.

Hearing upon Motion of Defendants to Quash Writ of Error.

Appearances:

C. H. Olson for the Plaintiff-Respondent.

D. L. Withington and A. Lewis, Jr., for the Motion.

The above entitled motion having been by the Court set for this day for argument, when the Court convened, Mr. Olson rose and addressed the Court in words substantially as follows: "If the Court please in this matter of this motion to quash, Mr. Withington's approaching departure for the states was what made me particularly willing the other day to consent to this matter being set for today. I am naturally embarrassed by the fact that I have just come into the case, Mr. Robertson withdrawing the other day; our appearance and

Mr. Robertson's consent to the substitution being on file with the record; we appear for the plaintiff in error. In view of the fact that we have come in recently, and in view of the fact we have had no time to communicate with our parties away from here, I would ask for time until after we receive our letter of instructions by
337 the Mongolia due here on the 10th of October to file a supplemental brief on this motion to quash, and counsel for defendants in error to have few days thereafter to file their reply. This motion is important in the case, I therefore request now, before the motion is presented that we be allowed immediately upon the arrival of the Mongolia here to file my supplemental brief, and opposite counsel to have reasonable time thereafter to reply. We are ready to argue now the motion orally.

The Court stated to counsel that its understanding is, that counsel desire to submit the case on the main briefs.

Mr. Olson replied that it was not his desire to change that.

Mr. Lewis stated to the Court that as far as the main case is concerned that counsel have agreed to submit it on the briefs, and the supplemental briefs will be limited only to such new points on the motion, and in conclusion, Mr. Lewis asked for five days for filing their additional authorities.

Mr. Withington stated that so far as the main case is concerned if there is request for oral argument, that Mr. Lewis will argue it, and that he (Withington) did not expect to be present.

During a discussion between the Court and counsel as to the proper course to be followed herein under the circumstances the Court then asked Mr. Withington when he expected to return from the mainland, and whether a postponement would affect the progress of the case, to which questions, Mr. Withington replied and stated, that he expected to return during the first week in December, he further stated that in his opinion a continuance of the case will not affect the progress of the case, but that Mr. Lewis differed with him, that Mr. Lewis' clients who are executors are anxious and would like to have the case disposed of.

338 Mr. Lewis stated to the Court that the Henry Waterhouse

Estate has been pending for five years, and that the heirs desire a distribution of the estate, that two of the heirs are ladies and he has often received letters from them urging that the matter be disposed of, also from the Henry Waterhouse Trust Company, and that the Waterhouse family desire to have the matter settled.

Mr. Olson suggested that the case go over.

The Court ruled allowing counsel to file their supplemental briefs, and then ordered that argument on the motion to quash writ of error be proceeded with.

At 10:42 A. M. Mr. Withington proceeded to read the motion to quash the writ of error, and then followed with his argument concluding at 11:45 A. M., and he was immediately followed by Mr. Lewis who concluded at 11:50 A. M.

At 11:51 A. M. Mr. Olson commenced with his argument, continuing until 12:5 P. M., at which time the Court took a recess until two o'clock this afternoon.

Motion continued until two o'clock this afternoon.

Vol. 3, p. 146.

Afternoon Session.

Court reconvened at 2 o'clock P. M.

Present on the Bench: Hon. Alfred S. Hartwell, C. J. Hon. A. A. Wilder and Hon. Antonio Perry, JJ.

S. C., No. 434.

From Page 143
To " 162.

WILLIAM W. BIERCE, LTD.,
v.
WILLIAM WATERHOUSE et al.

Error to Circuit Court, First Circuit.

Hearing Resumed on Defendants' Motion to Quash Writ of Error.

Appearances:

C. H. Olson of the firm of Holmes, Stanley & Olson for Plaintiff.

339 D. L. Withington and A. Lewis Jr. for Defendants-Movants.

At 2:5 P. M. Mr. Olson resumed with his argument against the above entitled motion, concluding such argument at 3:32 P. M.

Mr. Withington replied concluding at 3:48 P. M. and he was followed by Mr. Lewis who concluded at 4:4 P. M.

Motion submitted and taken under advisement.

At 4:5 P. M. the Court adjourned until 10 o'clock tomorrow morning, October 1.

J. A. THOMPSON,
Clerk Supreme Court.

340 Thereafter to wit, on the 14th day of October, A. D. 1909, came William W. Bierce, Limited, the plaintiff-in-error, in said Supreme Court, by its Attorneys, and filed in the clerk's office of said Supreme Court its certain motion for writ of certiorari, which said motion is in the words and figures following, to wit:

341 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,

v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Error to Circuit Court of First Circuit.

Motion for Writ of Certiorari.

Comes now William W. Bierce, Limited, the plaintiff in error in the above entitled cause, and moves that a writ of certiorari issue herein to the Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, directing said Clerk to transmit to the Supreme Court of the Territory of Hawaii, in order to complete the record herein in accordance with Section 1873 of the Revised Laws of Hawaii, the bill of exceptions of the defendants in error herein and all papers, exhibits, transcripts of evidence and matters made a part of said bill of exceptions by reference; and that an order be made directing the Clerk of said Supreme Court to return to said Circuit Court the said bill of exceptions now on record in said Supreme Court and all papers, exhibits, transcripts of evidence and matters made a part of said bill of exceptions by reference not heretofore returned to said Circuit Court, in order that the same may be transmitted by the said Clerk of said Circuit Court to this Court to complete said record herein as aforesaid;

This motion is made upon the ground that the said bill of exceptions and certain matters made a part thereof by reference have not been transmitted from said Circuit Court to said Supreme Court herein.

342 This motion is based upon the Clerk's certificate hereto attached and the record herein.

Honolulu, T. H. October 14, 1909.

WILLIAM W. BIERCE, LIMITED,

Said Plaintiff in Error,

(Signed)

By HOLMES, STANLEY & OLSON,

Its Attorneys.

To the Above Named Defendants in Error and Messrs. Smith & Lewis, Messrs. Castle & Withington, and J. W. Cathcart, Esq., Their Attorneys:

Please take notice that the foregoing motion will be presented to the Supreme Court of the Territory of Hawaii on Saturday, the 16th day of October, 1909, at ten o'clock A. M. of said day or as soon thereafter as counsel can be heard.

(Signed)

HOLMES, STANLEY & OLSON,

Attorneys for Plaintiffs in Error.

343 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,

v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Error to Circuit Court of First Circuit.

Clerk's Certificate.

I, J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii and also Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, hereby certify that the record in the above entitled cause heretofore transmitted to the Supreme Court of the Territory of Hawaii from said Circuit Court does not contain a bill of exceptions of the above named defendants in error nor a transcript of evidence and certain exhibits and other matters made a part of said bill of exceptions by reference; that the said bill of exceptions is on file in said Supreme Court in the record of the above entitled cause on said bill of exceptions, but that a transcript of evidence and certain exhibits and other matters made a part of said bill of exceptions by reference as aforesaid were heretofore returned from said Supreme Court to said Circuit Court.

Witness my hand and the Seals of said Supreme Court and said Circuit Court this 14th day of October, 1909.

[SEAL.]

(Signed)

J. A. THOMPSON,

[SEAL.]

Clerk of the Supreme Court of the Territory of Hawaii, and Clerk of the Circuit Court of the First Circuit, Territory of Hawaii.

Endorsed: No. 434. In the Supreme Court of the Territory of Hawaii. William W. Bierce, Limited, Plaintiff in error, v. William Waterhouse, et al., Defendants in error. Motion for Writ of Certiorari. Filed October 14, 1909, at 3:50 o'clock P. M. J. A. Thompson, Clerk. Holmes, Stanley & Olson, Kaahumanu St., Honolulu, Attorneys for Plaintiff in Error.

344 Thereafter, to wit, on the 19th day of October, A. D. 1909, there was issued by the clerk of the Supreme Court of the Territory of Hawaii, a writ of certiorari, commanding the clerk of said Circuit Court to search the record and proceedings in said cause in said Circuit Court and to certify what omissions he might find and for the transmission of the same from said Circuit Court to said Supreme Court, which said writ of certiorari and the return thereto and the record, proceedings and exhibits returned and filed therewith on the 22nd day of October, A. D. 1909, in the clerk's office of said Supreme Court, are in the words and figures following, to wit:

345 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,
v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under
the Will and of the Estate of Henry Waterhouse, Deceased, De-
fendants in Error.

Error to Circuit Court, First Circuit.

Writ of Certiorari.

THE TERRITORY OF HAWAII:

To Job Batchelor, Esq., Clerk of the Circuit Court of the First
Circuit of the Territory of Hawaii:

Whereas, in an action lately pending before the Circuit Court of
the First Circuit, Territory of Hawaii, in which the above named
William W. Bierce, Limited, was plaintiff, and the above named Wil-
liam Waterhouse and Albert Waterhouse, Executors under the Will
and of the Estate of Henry Waterhouse, deceased, were defendants,
which action is now pending in the Supreme Court of the Territory
of Hawaii on Error to said Circuit Court, a diminution of the record
and proceedings of said cause has been suggested, to wit:

That the transcript of evidence, certain exhibits and other mat-
ters, by reference made a part of the said defendants' bill of excep-
tions in said cause in said Circuit Court are omitted from the record
certified and transmitted from said Circuit Court to said Supreme
Court pursuant to the writ of error heretofore issued in the above en-
titled cause.

You are therefore commanded that, searching the record and pro-
ceedings in said cause in said Circuit Court, you certify what
346 omissions, to the extent aforesaid, you shall find, and send
up the same forthwith to the said Supreme Court, so that you
have the same, together with this writ, before the said Supreme Court
forthwith.

Witness the Honorable A. S. Hartwell, Chief Justice of the Su-
preme Court of the Territory of Hawaii, at Honolulu, Territory of
Hawaii, this 19th day of October, 1909.

By the Court:

[SEAL.]

(Signed)

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

H.

347 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Error to Circuit Court, First Circuit.

Return to Writ of Certiorari.

Pursuant to the Writ of Certiorari issued by the Supreme Court of the Territory of Hawaii on the 19th day of October, 1909, commanding me, Job Batchelor, Clerk of the Circuit Court of the First Circuit of the Territory of Hawaii, to search the record and proceedings in a cause in said Circuit Court between the above named William W. Bierce, Ltd., Plaintiff, and the above named William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants, which said cause is now pending in said Supreme Court on error to said Circuit Court, and to certify what omissions to the extent in said Writ of Certiorari enumerated, I shall find, and to transmit and send up the same forthwith, to the said Supreme Court, so that I shall have the same together with said Writ of Certiorari before the said Supreme Court forthwith, and in obedience to the said Writ, I have transmitted and sent up and do transmit and send up, herewith, to the said Supreme

348 Court, the following exhibits, documents and matters made a part by reference of the Bill of Exceptions of William Waterhouse and Albert Waterhouse, executors under the Will and of the Estate of Henry Waterhouse, deceased, defendants, filed in said Circuit Court, the same being on file in the records of the said cause in the said Circuit Court, to-wit:

1. Plaintiff's Exhibit "A." original Bill of Complaint, term summons, Replevin Affidavit of E. B. McClanahan and Notice to Sheriff.
2. Plaintiff's Exhibit "B." original Replevin Bond and Return Bond and Stipulation filed May 2, 1908.
3. Plaintiff's Exhibit "C." original Answer of Defendant.
4. Plaintiff's Exhibit "D." original motion by plaintiff to amend complaint and affidavit of E. B. McClanahan.
5. Plaintiff's Exhibit "E." original Stipulation for change of venue from Third Circuit to First Circuit.
6. Plaintiff's Exhibit "F." original defendants' Bond for costs and Motion for New Trial.
7. Plaintiff's Exhibit "G." original Findings of Fact.
8. Plaintiff's Exhibit "H." original Conclusions of Law.
9. Plaintiff's Exhibit "I." original decision Circuit Judge J. T. De Bolt.
10. Plaintiff's Exhibit "J." original Judgment Circuit Court.

11. Plaintiff's Exhibit "K." original order March 23, 1904, sustaining Plaintiff's objections to sufficiency of defendants' Bond for New Trial.

12. Plaintiff's Exhibit "L." original Motion by plaintiff
349 that defendant- file a new delivery Bond and Notice of Motion.

13. Plaintiff's Exhibit "M." original Order requiring defendant- to file a new re-delivery Bond.

14. Plaintiff's Exhibit "N." original Order Extending Time for defendant- to file a new re-delivery Bond.

15. Plaintiff's Exhibit "O." original Motion by Plaintiff for issuance of execution and notice of motion.

16. Plaintiff's Exhibit "P." original Order directing issuance of execution.

17. Plaintiff's Exhibit "Q." original execution, dated April 15, 1904.

18. Plaintiff's Exhibit "R." original Clerk's Minutes March 7, 1904. (L. 5782).

19. Plaintiff's Exhibit "S." original Clerk's Minutes March 8, 1904 (L. 5782).

20. Plaintiff's Exhibit "T." original Clerk's Minutes March 12, 1904 (L. 5782).

21. Plaintiff's Exhibit "U." original Clerk's Minutes March 19, 1904 (L. 5782).

22. Plaintiff's Exhibit "V." original Clerk's Minutes April 8, 1904 (L. 5782).

23. Plaintiff's Exhibit "AA." certified copy of Notice of Decision from Supreme Court of Hawaii.

24. Plaintiff's Exhibit "BB." original affidavit of Publication of notice to creditors in the matter of the Estate of Henry Waterhouse, Deceased.

25. Plaintiff's Exhibit "KK." Depositions of Columbus Bierce and H. T. Gilbert.

26. Plaintiff's Exhibit "CC." creditor's claim No. 1, dated September 6, 1904.

27. Plaintiff's Exhibit "DD." original letter dated September 26, 1904, by A. Waterhouse to Kinney, McClanahan & Cooper,
350 rejection of claim.

28. Plaintiff's Exhibit "EE." original creditor's claim No. 2, dated September 30, 1904.

29. Plaintiff's Exhibit "FF." Deposition- of Columbus Bierce and E. W. Holden, and Envelope containing same.

30. Plaintiff's Exhibit "GG." memorandum of calculation of interest.

31. Plaintiff's Exhibit "HH." Deed C. J. Hutchins, Trustee, to F. B. McStocker, appearing on pages 72-74 in the transcript of Testimony hereinafter referred to and sent up to said Supreme Court herewith.

32. Plaintiff's Exhibit "II." certified copy of Articles of Incorporation of William W. Bierce, Ltd.

33. Plaintiff's Exhibit "JJ." copy deed F. L. Dortch, Receiver, to C. J. Hutchins, Trustee.

And also the transcript of evidence or testimony made a part by reference of the said Bill of Exceptions.

And I do certify that pursuant and in obedience to the said Writ of Certiorari, I have searched the record and proceedings in the said cause in said Circuit Court and that the above enumerated and mentioned transcript of evidence and exhibits are the only matters and things in the files or records of the said cause in said Circuit Court, or which since the issuance of the Writ of Error heretofore issued by the said Supreme Court in the above entitled cause on error to said Circuit Court have been in the files or records of said cause in said Circuit Court, not heretofore transmitted or sent up from said Circuit Court to said Supreme Court in response and obedience to the said Writ of Error.

And I do further certify that the said original Bill of Exceptions and all documents, exhibits, transcripts of record and all
351 other matters and things made by reference a part of of the said Bill of Exceptions, not above enumerated or transmitted or sent up to said Supreme Court herewith or not heretofore transmitted or sent up from said Circuit Court to said Supreme Court in response or obedience to said Writ of Error, were transmitted and sent up from said Circuit Court to said Supreme Court as a part of the record of the said cause in said Supreme Court on exceptions from said Circuit Court prior to the issuance of the said Writ of Error, to-wit, on the 18th day of December, 1908, and that the same and none of the same have since said last mentioned date to this date been returned from said Supreme Court to said Circuit Court.

In witness whereof, I, the said Job Batchelor, Clerk of the Circuit Court of the First Circuit of the Territory of Hawaii, have hereunto set my hand and the seal of the said Circuit Court, this 22nd day of October, 1909.

[SEAL.]

(Signed) JOB BATCHELOR,
*Clerk of the Circuit Court of the First Circuit
of the Territory of Hawaii.*

Endorsed: No. 434. In the Supreme Court of the Territory of Hawaii. William W. Bierce, Limited, Plaintiff in Error, v. William Waterhouse and Albert Waterhouse, Executors under the Will, and of the Estate of Henry Waterhouse, Deceased, Defendants in Error. Error to Circuit Court, First Circuit. Writ of Certiorari, and Return. Issued at 11:15 a. m. October 19, 1909. J. A. Thompson, Clerk. Returned & filed Oct. 22, 1909, at 12 M. J. A. Thompson, Clerk.

352 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

(\$2.00 Stamps.)

Replevin.

Complaint.

Now comes William W. Bierce Limited, plaintiff herein, by its attorneys Kinney & McClanahan, and complains of Clinton J. Hutchins Trustee and for cause of action shows:

1.

That plaintiff is a corporation duly organized and existing under the laws of the State of Louisiana and having its principal place of business in the City of Chicago in the State of Illinois.

2.

That the defendant is a resident of Honolulu, Island of Oahu, Territory of Hawaii, and a citizen of the said Territory of Hawaii.

3.

That on or about February 21st A. D. 1900 the said plaintiff agreed to furnish to the Kona Sugar Co. Ltd., a corporation duly organized and existing under the laws of the Territory of Hawaii, certain rails, engines, cars and other goods and merchandise for use on the plantation of the said Kona Sugar Co. Ltd. in the District of Kona, Island and Territory of Hawaii, at prices specified

353 in the said agreement, which prices the said Kona Sugar Co. Ltd. agreed in writing to pay in cash upon the presentation of a demand draft attached to the bill of lading issued by the initial railroad, showing the said goods and merchandise to have been shipped through to the city of Honolulu, Island of Oahu, Territory of Hawaii.

4.

That in pursuance of the said agreement said plaintiff proceeded to ship the articles mentioned in said agreement to said Honolulu; that upon shipment of said goods and merchandise demand was made upon the said Kona Sugar Co. Ltd. for the payment of the price thereof in accordance with the terms of the agreement before mentioned. That the said Kona Sugar Co. Ltd., failed, neglected and refused to pay the said price or any part thereof; that because of this said failure on the part of the Kona Sugar Co. Ltd., the said goods and merchandise were not upon their arrival at said Honolulu nor at any other time, save as hereinafter mentioned, delivered to the said

Kona Sugar Co. Ltd., nor was the title to said goods and merchandise or the right of property therein or the title or right of property of or in any part thereof ever transferred or taken from plaintiff, but that plaintiff retained both the title and possession and the right to the possession of the said goods and merchandise and each and all of them and every part thereof, and refused to permit them or any of them to pass into the possession of the said Kona Sugar Co. Ltd., except as hereinafter stated, nor did they or any of them in fact pass into the possession of the Kona Sugar Co. Ltd., except as hereinafter stated.

354

5.

Amendment allowed by the Court this 7th day of March, 1904.—(Sig.) P. D. Kellett, Jr., Clerk.

That thereafter, to wit on or about said agreement of February 21, 1900, was adjusted and settled by a contract in writing March 13th, 1901, [a supplementary contract in writing was]* entered into between the said William W. Bierce, Ltd. and the said Kona Sugar Co. Ltd., whereby the said William W. Bierce Ltd. offered in writing to permit the said Kona Sugar Co. Ltd., to take possession of the said rails, engines, cars and other goods and merchandise mentioned and to use the same upon the payment of \$10,000.00 Gold Coin to the said William W. Bierce Ltd. and the execution of a promissory note by the said Kona Sugar Co. Ltd. to the said William W. Bierce Ltd. for \$37,044.53, payable six months from date, upon the express condition, understanding and agreement that the said goods and merchandise should not become the property of the said Kona Sugar Co. Ltd., until the payment of the said note; which said offer and each and all of the terms and conditions thereof were accepted in writing by the said Kona Sugar Co. Ltd. upon the 13th day of March A. D. 1901 and a promissory note for \$37,044.53 payable six months after date to the order of William W. Bierce Ltd. was duly executed and delivered by the said Kona Sugar Co. Ltd., to the said William W. Bierce Ltd. Copies of said contract and note, marked respectively Exhibit "A" and Exhibit "B" are hereto attached referred to and made a part hereof.

6.

Amendment allowed by the Court this 7th day of March, 1904.—(Sig.) P. D. Kellett, Jr., Clerk.

That thereafter, in accordance with the terms of said [supplementary]* of March 13th 1901 contract A but not otherwise, the said William W. Bierce Ltd. permitted the said Kona Sugar Co. Ltd., to take possession of and the said Kona Sugar Co. Ltd., did in fact take possession of the following goods and merchandise, to-wit:

[* Words enclosed in brackets erased in copy.]

362 tons of steel T. rails weighing 35 lbs. to the yard.
 Joints for laying 550 tons of Steel T. rails.
 Railroad track spikes to lay 550 tons of said rails.
 10 sets of 35 lb. split switch material, complete.
 16 cars, 25 feet long, 7 feet wide for 3 ft. gauge track.
 One 9 x 14 Class "A" saddle tank locomotive.
 One 10 x 16 back saddle tank locomotive.
 One Howe Narrow gauge track scale, capacity 25 tons.
 One set re-railers.
 Four track gaugers, 3 feet.
 One rail bender.
 One track drill.
 One section car with seats.
 Two jacks.

Which said rails, cars, engines and other goods and merchandise as above enumerated were then and continued to be the property of the said William W. Bierce Ltd.; that the said Kona Sugar Co. Ltd., failed upon September 13th, 1901, said date being six months from the date of the execution of the promissory note mentioned to pay the said note or the sum therein mentioned or any part thereof, nor has it the said Kona Sugar Co. Ltd. at any time since said date nor at any time, though thereto often requested by plaintiff, paid the said note or the sum therein mentioned or any part thereof nor has any third person for or on behalf of the said Kona Sugar Co. Ltd. or otherwise paid the said note or the sum therein mentioned or any part thereof.

7.

Amendment allowed by the Court this 7th day of March, 1904.—(Sig.) P. D. Kellett, Jr., Clerk.

That from the date of said [supple-
 of March 13th, 1901,
 mentary]* contract A and up to the
 1st day of June A. D. 1903, the afore-
 said property was at all times in the
 possession and control of the Kona
 Sugar Co. Ltd. or the Receivers of the said Kona Sugar Co. Ltd.
 duly appointed.

8.

That on or about the 1st day of April A. D. 1903, the Honorable W. S. Edings, Judge of the Circuit Court of the Third Circuit, sitting at Chambers in Equity, in that certain case of R. W. McChesney et al. vs. The Kona Sugar Co. Ltd. et al. ordered F. L. Dortch, then Receiver of the Kona Sugar Co. Ltd. to sell all the property, both real and personal of the said Kona Sugar Co. Ltd.; that in pursuance of the said order the said F. L. Dortch proceeded to offer for sale and on the 9th day of May A. D. 1903, did sell the property of the Kona Sugar Co. Ltd., aforesaid, but that the said F. L. Dortch did not and could not sell the rails, cars, engines and goods and merchandise hereinabove more particularly described for the reason

[* Word enclosed in brackets erased in copy.]

that the same were then and now are the property of William W. Bierce, Ltd., plaintiff herein.

9.

That at the said sale of the property of the Kona Sugar Co. Ltd. the defendant C. J. Hutchins Trustee became the purchaser of the said property of the Kona Sugar Company Ltd.; that on June 1st, A. D. 1903, the Honorable W. S. Edings, Judge of the Circuit Court of the Third Circuit sitting at Chambers in Equity made an order confirming the said sale; and that thereupon the defendant proceeded to and did take possession of all the property, real and personal, belonging to the Kona Sugar Co. Ltd.

10.

That the said defendant in addition to taking possession of the property of the Kona Sugar Co. Ltd. also took possession and control of the rails, engines, cars and other goods and merchandise hereinbefore more particularly described, belonging to plaintiff, and still retains possession and control of the same which said
357 taking and retaining of the possession of the said rails, engines, cars and the other goods and merchandise hereinbefore more particularly described were unlawful and in contravention of the rights of plaintiff under the law.

11.

That the said rails, cars, engines and goods and merchandise hereinbefore more particularly described have been at all times mentioned in this complaint and now are the property of plaintiff and it has been and still is the true and lawful owner thereof and is entitled to the exclusive and immediate possession thereof.

12.

That the said William W. Bierce Ltd. has demanded of said defendant the return of all and singular the property aforesaid; but that said defendant has failed, neglected and refused and still fails, neglects and refuses to return the said property or any portion thereof; that the said property was wrongfully taken and now is wrongfully detained by said defendant contrary to the rights of plaintiff therein; that the said property was taken by defendant and is now detained by defendant in the District of Kona, Island and Territory of Hawaii, and within the jurisdiction of this Honorable Court.

13.

That the said property has not been taken for a tax assessment or pursuant to a statute or seized under an execution or an attachment against the property of the plaintiff.

14.

That the actual value of the said property is [Fifteen Thousand Dollars.
sand Dollars (\$15,000.00)].*

Amendment allowed by the Court, this 7th day of March, 1904.—(Sig.) P. D. Kellett, Jr., Clerk.

Amendment allowed by the Court by substituting \$22,000 for \$20,000, this 19th of M'ch, 1904.—(Sig.) P. D. Kellett, Jr., Clerk.

Wherefore the plaintiff prays:

1. That the process of this court may issue summoning the said defendant to appear and answer this complaint before a jury of the country at the December 1903 Term of this Honorable Court, unless sooner disposed of by judicial authority.

2. That plaintiff may have judgment for the return of all and singular the said property together with damages for its taking and retention and the costs of this action.

WILLIAM W. BIERCE, LIMITED,
By KINNEY & McCLANAHAN,
E. B. M.,
Its Attorneys.

(Sig.)

Dated, Honolulu, July 20th, 1903.

HONOLULU, OAHU,
Territory of Hawaii, ss:

E. B. McClanahan being first duly sworn on oath deposes and says:

That he is a member of the firm of Kinney & McClanahan, attorneys for William W. Bierce, Ltd., above-named plaintiff. That William W. Bierce Ltd. is a foreign corporation doing business without the Territory of Hawaii, that Kinney & McClanahan are the representatives of William W. Bierce Ltd. in this jurisdiction, that he has read the foregoing complaint and know the contents thereof and that the matters and things set forth therein are true to the best of his knowledge, information and belief.

(Signed)

E. B. McCLANAHAN.

Subscribed and sworn to before me this 20th day of July, A. D. 1903.

(Signed)

[SEAL.]

GUSSIE H. CLARK,
Notary Public, First Judicial Circuit.

359

EXHIBIT "A."

HONOLULU, H. T., Mar. 13, 1901.

Kona Sugar Company, Limited, Honolulu, H. I.

GENTLEMEN: In pursuance of the verbal agreement made between your President and William W. Bierce, Limited, we hereby offer

[* Words and figures enclosed in brackets erased in copy.]

the following terms in settlement of the contract between the Kona Sugar Company Limited and William W. Bierce Limited as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company, Limited, Feb. 22, 1900:

We will take in settlement of this contract the sum of \$10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of \$37,044.53, in favor of William W. Bierce, Ltd., payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent ($7\frac{1}{2}\%$) per annum and secured by First Mortgage Bonds of the Kona Sugar Company Limited of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding \$200,000. This offer is conditioned upon its acceptance by you- payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us, before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until
360 the full payment of the note above described, according to its terms.

Very truly yours,

W. W. BIERCE, LTD.,
By H. T. GILBERT.

The above terms are accepted this March 13, 1901.

THE KONA SUGAR CO., LTD.,

J. M.

[SEAL.] By Its President, [F. W.]* McCHESNEY.

By Its Treasurer,

F. W. McCHESNEY.

Amendment allowed by the
Court this 8th day of March,
1904.—(Sig.) P. D. Kellett,
Jr., Clerk.

Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy-six (76) \$500. Bonds of the Kona Sugar Co. Numbered from 1 to 76 both inclusive.

W. W. BIERCE, LTD.,
By H. T. GILBERT.

361

EXHIBIT "B."

\$37,044.53.

HONOLULU, H. I., March 13, 1901.

Six months after date we promise to pay to the order of Wm. W. Bierce, Limited, at the Whitney National Bank of New Orleans, La.,

[* Letters enclosed in brackets erased in copy.]

U. S. A. the sum of Thirty Seven Thousand and Forty-four Dollars and 53/100 (37044.53) with interest at the rate of Seven and one-half per cent. per annum until paid both principal and interest payable in gold coin of the United States.

Secured by Bonds of the Kona Sugar Co. of the nominal value of Thirty Eight Thousand Dollars \$38000—(Seventy Six Bonds of the value of \$500.00 each—numbered from 1 to 76 both numbers inclusive.)

THE KONA SUGAR CO., LTD.,
By Its President, J. M. McCHESNEY.
By Its Treasurer, F. W. McCHESNEY.

(Indorsed.)

Pay to the order of Harry T. Gilbert.

W. W. Bonden,	Wm. W. Bierce, Limited,
Sec'ty & Treas.	By Wm. W. Bierce, Pre'd't.
	Harry T. Gilbert.

Wm. W. Bierce, Ltd.	Wm. W. Bierce, Ltd.,
W. W. Bonden,	By C. Bierce,
Sec'ty & Treas.	V.-Pres't.

(Stamps.)

Indorsement: Law. No. —. Circuit Court 3rd Circuit Territory of Hawaii. Wm. W. Bierce, Ltd., Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Replevin. ———, Judge. Kinney & McClanahan, Honolulu, Attorneys for Plaintiff. Office No. —. Rec'd \$33.00. J. P. Curts.

362 In the Circuit Court of the Third Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LTD., a Corporation,

v.

CLINTON J. HUTCHINS, Trustee.

Term Summons.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii, or his Deputy, the Sheriff of the Island of Hawaii, or his Deputy:

You are commanded to summon Clinton J. Hutchins, Trustee, Defendant in case he shall file written answer within twenty days after service hereof, to be and appear before the said Circuit Court at the December Term thereof, to be holden at Kailua Island of Hawaii on Wednesday the 23rd day of December next, at 10 o'clock A. M., to show cause why the claim of William W. Bierce Ltd. a corporation Plaintiff should not be awarded to it pursuant to the tenor of its annexed Petition.

And you are commanded to — and have you then there this Writ with full return of your proceedings thereon.

Witness Hon. W. S. Edings, Judge of the Circuit Court of the Third Circuit, at Kailua, Hawaii, this 20th day of July, 1903.

[SEAL.]

(Signed)

HENRY SMITH,

Clerk Judiciary Department.

363 Indorsement: Circuit Court Third Circuit. William W. Bierce Ltd. a corporation v. Clinton J. Hutchins, Trustee. Term Summons. Issued at 3 o'clock P. M. July 20 1903. Henry Smith, Clerk Jud. Dep't. Returned at 7 o'clock A. M. Aug. 1, 1903. J. P. Curts, Clerk. — Service at \$1.00 each \$—. — Cop- at \$1.50 each —. Expense —. Total \$—.

Served the within summons as follows:

On Clinton J. Hutchins, Trustee, at his office in the City of Honolulu, Oahu, Territory of Hawaii, on the 20th day of July, A. D. 1903, by delivering to him a certified copy hereof and of the complaint hereto annexed [together with a certified copy of the affidavit and notice and a copy of the Replevin Bond given herein]* and at the same time showing to him the original summons and complaint, [affidavit, notice and bond.]*

Dated July 20, 1903.

(Signed)

CHAS. F. CHILLINGWORTH,

Deputy Sheriff.

364 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LTD., a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Affidavit.

HONOLULU, OAHU,
Territory of Hawaii, ss:

E. B. McClanahan, being duly sworn, on oath deposes and says: that he is a member of the firm of Kinney & McClanahan the attorneys of William W. Bierce Ltd., a Louisiana corporation plaintiff in the above entitled action: that he is familiar with the facts alleged herein and that he makes this affidavit on behalf of said corporation.

First. That the said William W. Bierce Ltd., is the owner of the following property, to-wit:

362 tons of steel T rails, weighing 35 lbs. to yd.

Joints for laying 550 tons of steel T rails.

[* Words enclosed in brackets erased in copy.]

Railroad track spikes to lay 550 tons of said rails.
 Ten sets of 35 pound split switch material, complete.
 16 cars 28 feet along 7 feet wide for 3 ft. gauge track.
 One 9 x 14 Class "A" saddle tank locomotive.
 One 10 x 16 Class "M" back saddle tank Locomotive.
 One Howe narrow gauge track scale, capacity 25 tons.
 One set re-railers.
 Four track gaugers, 3 ft.
 One rail bender.
 365 One track drill.
 One section car with seats.

Two Jacks.

Second. That the said property is now unlawfully detained by the above-mentioned defendant.

Third. That the said property has not been taken for a tax, assessment or fine pursuant to a statute or seized under an execution or an attachment against the property of the plaintiff.

Fourth. That the actual value of the said property is Fifteen Thousand (15,000) Dollars.

(Signed)

E. B. McCLANAHAN.

Subscribed and sworn to before me this 20th day of July, A. D. 1903.

[SEAL.]

(Signed)

GUSSIE H. CLARK,

Notary Public, First Judicial Circuit.

HONOLULU, H. T., July 20, 1903.

To the High Sheriff of the Territory of Hawaii or the Sheriff of the Island of Hawaii or his deputy:

You are hereby required to take the property from the defendant in the action entitled herein or from his agent or agents. Said property being that fully described herein.

(Signed)

KINNEY & McCLANAHAN,

*Attorneys for William W. Bierce, Ltd.,
 the Plaintiff Herein.*

366 Served the within Affidavit, Notice and Bond on the within named Clinton J. Hutchins, Trustee, defendant, at Honolulu, Oahu, this 21st day of July, A. D. 1903, by delivering to him, copies hereof and at the same time showing him the original Affidavit, Notice and Bond.

Dated July 21st, 1903.

(Signed)

ALBERT MCGURN,

Deputy Sheriff.

367 In pursuance of the within Affidavit and Order, I did on the 22nd day of July, A. D. 1903, attach and take into my custody all the following described property:

362 tons of steel rails, weighing 35 lbs. to yd.

Joints for laying 550 tons of steel rails.

Railroad track spikes to lay 550 tons of said rails.
 Ten sets of 35 pound split switch material, complete.
 16 cars 28 feet along 7 feet wide for 3 ft. gauge track.
 One 9 x 14 Class "A" saddle tank locomotive.
 One 10 x 16 Class "A" back bag saddle tank locomotive.
 One Howe narrow gauge track scale, capacity 25 tons.
 One set re-railers.
 Four track gaugers, 3 ft.
 One rail bender.
 One track drill.
 One section car with seats.
 Two Jacks.

the same being the property in said Affidavit enumerated.

And did on the 22nd day of July, A. D. 1903, release said property from such attachment upon the filing by defendant of a written undertaking for double the value of the property attached.

(Signed)

J. K. NAHALE,

Deputy Sheriff of North Kona, Hawaii.

Indorsement: — No. — Circuit Court 3rd Circuit Territory of Hawaii. William W. Bierce, Ltd., a corporation, Plaintiff, vs. Clinton J. Hutchins, Trustee Defendant. Affidavit. De Bolt, Judge. Kinney & McClanahan Honolulu Attorneys for W. W. Bierce, Ltd. Filed Aug. 1, 1903 7 o'clock A. M. J. P. Curts, Clerk.

368 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

(\$1.00 Stamp.)

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
 vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Bond.

Know all men by these presents:

That we, William W. Bierce, Limited, a Louisiana corporation having its principal place of business in Chicago, State of Illinois, acting herein by its duly authorized and appointed attorney-in-fact, H. A. Bigelow as Principal and John A. McCandless and William R. Castle as Sureties, both of Honolulu, Territory of Hawaii, and residing in said Honolulu, are held and firmly bound unto Clinton J. Hutchins, Trustee, his successor or successors in trust, heirs and assigns by these presents in the sum of Thirty Thousand (30,000) Dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our successors, executors and administrators, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce Ltd. has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a Replevin suit against the above-mentioned defendant to recover from him certain property more specifically set forth in the Bill of Complaint filed in said suit, which is hereby referred to, and has in writing requested the High Sheriff of the Territory of Hawaii, or his Deputy, or the Sheriff of the Territory of Hawaii, or his Deputy to take the aforementioned property from the said defendant,

Now therefore if the said plaintiff shall well and truly prosecute the said action of Replevin to a successful and final termination, or in case the return of said personal property to the defendant be adjudged and said plaintiff, Principal herein, shall return the same to the said defendant and shall pay to him the said defendant such sum as may from any cause be recovered against the said plaintiff, then this obligation is to be null and void, otherwise to remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 20th day of July, A. D. 1903.

WILLIAM W. BIERCE, LIMITED,
 (Signed) By H. A. BIGELOW,
Its Attorney-in-Fact.
 (Signed) J. A. McCANDLESS.
 (Signed) WILLIAM R. CASTLE.

The foregoing bond is hereby approved as to its sufficiency of sureties.

(Signed) A. M. BROWN,
High Sheriff.

Honolulu July 20th, 1903.

Indorsement: 1370. Law, No. 5782. Circuit Court 3rd Circuit, Territory of Hawaii. William W. Bierce, Limited, a Corporation, Plaintiff vs. Clinton J. Hutchins, Trustee Defendant. Bond. De Bolt Judge. Kinney & McClanahan Honolulu Attorneys for W. W. Bierce, Ltd. Office No. —. Filed Aug. 1st, 1903, 7 o'clock a. m. J. P. Curts, Clerk. Law, 6023. Exhibit B Plaintiff May 7/06. 3 documents. Stipulation Return Bond. Replevin do. Law, No. 6023. Plaintiff's Exhibit B. Filed May 7th, 1908. Job Batchelor, Clerk.

370 Circuit Court, Third Circuit, Territory of Hawaii.

\$1.00 Stamp.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
v.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Return Bond.

Know all men by these presents:

That we Clinton J. Hutchins, Trustee, as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns in the sum of thirty thousand (30,000) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, herein and administrators jointly and severally firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the circuit court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies:

371 Now Therefore, if the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Signed)

CLINTON J. HUTCHINS, *Trustee.*

(Signed)

HENRY WATERHOUSE, *Surety.*

(Signed)

ARTHUR B. WOOD, *Surety.*

The foregoing Bond is approved as to its sufficiency of sureties.

Dated July 21, 1903.

(Signed)

A. M. BROWN,

High Sheriff.

Indorsement: 1370. L. 5782. Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, a Corporation, Plain-

tiff, v. Clinton J. Hutchins, Trustee. Return Bond. Filed Aug. 1st, 1903 7 o'clock a. m. J. P. Curts, Clerk. Law 6023. Plaintiff Exhibit B. 1. Stipulation. 2. Return Bond. 3. Replevin Bond. Filed May 7th, '08. 3. Documents. Law No. 6023. Plaintiff's Exhibit "B," Filed May 7th, 1908. Job Batchelor, Clerk.

372 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Stipulation.

It is hereby stipulated by and between the parties in the above entitled cause that the redelivery bond filed in the action of replevin entitled William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee, and dated July 21, 1903,

Amended May 1st, 1907.— [a copy whereof is attached to the (Sig.) S. & L. Out.—(Sig.) plaintiff's amended complaint in the S. & L. above entitled cause, and]* the original whereof now remains in the files

of said Circuit Court of the First Circuit, was duly executed by the said Clinton J. Hutchins, Trustee, as principal, and the said Henry Waterhouse and Arthur B. Wood, as sureties and delivered to the high sheriff and filed in said action; and that the signatures to said bond are the genuine signatures of the said Clinton J. Hutchins, Trustee, Henry Waterhouse and Arthur B. Wood respectively.

It is also stipulated and agreed that this stipulation may be read on the trial of the above entitled cause as evidence of the facts
373 hereinabove set forth, and that said bond may be so read in evidence without further proof of its execution.

Dated, Honolulu, April 30, 1908.

(Signed) A. G. M. ROBERTSON,
Attorney for Plaintiff.

(Signed) CASTLE & WITHINGTON,
Attorneys for Clinton J. Hutchins, Trustee.

(Signed) SMITH & LEWIS,
*Attorneys for the Executors under the Will of
Henry Waterhouse, Deceased, and Arthur B. Wood.*

Indorsements: Law 6023. Circuit Court First Circuit. Assumpsit. William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee, et al. Stipulation. Filed May 2d, 1908, at 10:30 o'clock A. M. J. A.

[* Words enclosed in brackets erased in copy.]

Thompson, Clerk. Law 6023. Plaintiff's Exhibit B 1 Stipulation and 2 Return Bond 3 Replevin do May 7th, '08. 3 documents. Law No. 6023 Plaintiff's Exhibit B Filed May 7th 1908 Job Batchelor, Clerk.

374 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Answer.

Now comes the defendant above named and for his answer to the complaint of plaintiff herein says:

I.

1. Defendant admits that he is a resident and citizen of the Territory of Hawaii, as in said complaint alleged.

2. Defendant admits that under and by virtue of an order of the Honorable W. S. Edings, Judge of the Circuit Court, Third Circuit, Territory of Hawaii, sitting at Chambers in Equity, duly made and entered in that certain action before him pending, entitled, R. W. McChesney, et al., vs. Kona Sugar Company, Limited, et al., all of the property, real, personal and mixed, of the said Kona Sugar Company, Limited, was, on or about the 9th day of May, 1903, sold to this defendant free and clear of all incumbrances.

3. Defendant alleges that the personal property set forth and described in said complaint was on said 9th day of May, 1903, and long prior thereto, the property of said Kona Sugar Company, Limited, and was part of the assets and property so as aforesaid then and

P. D. K., Jr., 3/10/04.

Amendment allowed by the Court this 10th day of M'ch, 1904.—P. D. Kellett, Jr., Clerk.

there sold to this defendant; [and and defendant upon the confirmation of said sale on the first day of June, 1903, became, ever since has been and now is the owner in lawful possession thereof. defendant then became, ever since has been and now is the owner in lawful possession thereof.]*

II.

And, except as hereinbefore admitted, qualified or alleged,
375 defendant denies the truth of the facts stated in said complaint and in each and every allegation thereof; and denies the truth of each and every fact therein stated.

[* Words enclosed in brackets erased in copy.]

Wherefore defendant asks to be hence dismissed with costs of this action.

Dated August 20th, A. D. 1903.

(Signed)

CLINTON J. HUTCHINS,
Trustee, Defendant.

(Signed) JNO. W. CATHCART,
Attorney for Defendant.

Endorsed: Circuit Court, Third Judicial Circuit, Territory of Hawaii. William W. Bierce, Limited, a corporation, Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Answer. Filed Aug. 20, 1903, in Third Circuit Court. Henry Smith, Clerk, Jud. Dept. John W. Cathcart, Attorney for Defendant, Stangenwald Building, Honolulu, T. H.

376 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion to Amend.

Now comes the above named plaintiff, by its attorneys Kinney, McClanahan & Cooper, and moves to amend its complaint heretofore filed herein as follows:

In paragraph 5 on the third page of said complaint *on* the first and second line- of said paragraph, strike out the words "a supplementary contract in writing was," and *in* insert in lieu thereof the words, "said agreement of February 21, 1900, was adjusted and settled by a contract in writing."

In paragraph 6 on the fourth page of said complaint, *on* the second line of said paragraph striking out the word "supplementary" and adding after the word "contract" *on* said line, the words "of March 13th, 1901."

In paragraph 7 on the fifth page of said complaint *on* the first line of said paragraph, strike out the word "supplementary" and add after the word "contract" *on* said line the words "of March 13th, 1901."

In paragraph 14 on the seventh page of said complaint, strike out the words "Fifteen Thousand Dollars" and repeated numerals in brackets, and add in lieu thereof the words "Twenty Thousand Dollars."

377 This motion is based on the records, and the affidavit of E. B. McClanahan attached to and made a part hereof.

Dated, March 4th, 1904.

(Signed) KINNEY, McCLANAHAN & COOPER,
Attorneys for W. W. Bierce, Ltd.

378 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Affidavit of E. B. McClanahan.

HONOLULU, OAHU,
Territory of Hawaii, ss:

E. B. McClanahan being first duly sworn on oath deposes and says:

That he is one of the attorneys for the above named plaintiff, and as such for said plaintiff swore to the complaint filed herein; that at the time said complaint was drawn affiant had no positive knowledge directly from the plaintiff as to the actual value of the property sued for, *that* that his knowledge which he had was the best obtainable under the circumstances as they then existed.

That within the past few days, affiant has obtained more satisfactory and detail knowledge of the actual value of said property and for such reason desires on behalf of the said plaintiff to incorporate in said complaint, by way of amendment the value now believed by him to be the actual value of said goods, namely,
379 \$20,000.

(Signed)

E. B. McLANAHAN.

Subscribed and sworn to before me this 3rd day of March 1904.

(Signed)

E. B. McCLANAHAN.

[SEAL.]

Notary Public, First Judicial Circuit.

Endorsed: Law No. 5782. Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff vs. Clinton J. Hutchins, Defendant. Motion to Amend and Affidavit. ———, Judge. Filed Mc'h 4th, 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu. Attorneys for ———. (Office No. —.)

380 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above cause that the venue of the same be changed from the Third Circuit to the First Circuit, and that the trial take place before the Circuit Court of the First Circuit instead of before the Circuit Court of the Third Circuit, and the said parties further agree that the above cause shall not be brought JNO. W. C.
the last week of S. H. D.
up for trial until ^ February 1904.
Dated, Honolulu, December 14th, 1903.

WILLIAM W. BIERCE,
LIMITED,
(Signed) By Its Attorneys, KINNEY, McCLANAHAN &
COOPER.
CLINTON J. HUTCHINS,
Trustee,
(Signed) By His Attorneys, JNO. W. CATHCART.

I allow the foregoing & hereby transfer said cause to the Circuit Court of the First Circuit & direct the Clerk of this Court to
381 forward all papers in said cause to the First Circuit as aforesaid.

(Signed) W. S. EDINGS,
Judge Circ't Ct., Third Circ't.

Endorsed: Law No. 5782. Circuit Court, First Circuit, Territory of Hawaii. Wm. W. Bierce, Ltd., Plaintiff vs. C. J. Hutchins, Defendant. Stipulation for Change of Venue. W. S. Edings, Judge. Filed December 16, 1903. J. P. Curtis, Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for Plaintiff. (Office No. —.)

382 In the Circuit Court of the Third Judicial Circuit (Transferred to First Judicial Circuit), Territory of Hawaii.

WILLIAM W. BIERCE, LTD., Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

(\$1.00 Stamp.)

Bond.

Know all men by these presents:

That Clinton J. Hutchins, trustee, as principal, and M. F. Scott as surety are held and firmly bound unto Henry Smith, Esq. Clerk of the Judiciary Department of the Territory of Hawaii, and his successors in office in the penal sum of One Thousand Dollars which sum, well and truly to be paid, the said principal and surety do hereby bind themselves, their respective successors, heirs, executors, administrators and assigns.

The condition of the above obligation are as follows:

That whereas in an action in replevin brought in the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii by William W. Bierce, Ltd., as plaintiff against Clinton J. Hutchins, Trustee, as defendant, on the 20th day of July, A. D. 1903 (which action was subsequently by stipulation of said parties transferred to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii for trial before the Honorable J. T. De Bolt, Judge of said Court, jury waived,) a decision was on the 12th day of March A. D. 1904 rendered by the Judge of said Circuit Court of the First Judicial Circuit in favor of said plaintiff and against said defendant, and thereafter to wit on the 19th day of March A. D. 1904,

383 Judgment was entered by the Clerk of said Court in accordance with said decision,

And whereas said decision having been duly excepted to by the said defendant at the time of its being rendered and a notice of motion for a new trial having thereupon been duly given and the costs of said action having been paid by said defendant to the Clerk of said Circuit Court of the First Judicial Circuit.

Now therefore, if said motion for a new trial is perfected and all costs of motion in case said defendant fails to sustain the same are paid, and if such defendant shall not to the detriment of the plaintiff in said action remove or otherwise dispose of any property he may have liable to execution on such judgment, and if all costs are paid by the said defendant on writ of error or exceptions to the Supreme Court of the Territory of Hawaii, if any such writ of error or exceptions are taken, then this obligation shall be null and void, otherwise to remain in full force and effect.

This bond is given under Section 1458 of the Civil Laws of the

Territory of Hawaii, and is intended to cover all costs until the final determination of said action.

Dated, Honolulu this 21st day of March, A. D. 1904.

(Signed) CLINTON J. HUTCHINS, *Trustee*,
By C. J. FALK, *Attorney in Fact*.
(Signed) M. F. SCOTT, *Surety*.

The foregoing bond is hereby approved.

(Signed) J. T. DE BOLT, *Judge*.

Endorsed: 1370. L. 5782. Circuit Court, Third Circuit (Transferred to First Circuit) Territory of Hawaii. William W. Bierce, Limited, Plaintiff vs. Clinton J. Hutchins, Trustee, Defendant. Bond. ——— Judge. Filed March 21, 1904. Geo. Lucas, Clerk. Cathcart & Milverton, Honolulu, Attorneys for Defendant. (Office No. —) Law, 6023. Bond and Notice of Motion. Plaintiff- Exhibit F. Notice of Motion in Record. Law, No. 6023. Plaintiff's Exhibit F. Filed May 8th, 1908. Job Batchelor, Clerk.

384 In the Circuit Court of the Third Judicial Circuit (Transferred to First Judicial Circuit), Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion for New Trial.

Comes now Clinton J. Hutchins, Trustee, the defendant above named, by his attorneys Cathcart & Milverton, and moves this Honorable Court that the decision and judgment in the above entitled action rendered and entered on the 12th day of March, A. D. 1904, and the 19th day of March, 1904, respectively, in favor of the above entitled plaintiff and against said defendant, be set aside, and a new trial granted on the following grounds, to wit:

For that the said decision and judgment were and are contrary to the law and the evidence, and the weight of the evidence, and for errors of law occurring during the trial of said action, which errors were duly excepted to by said defendant and such exceptions allowed by the court.

This motion is based upon all the pleadings, papers, files and proceedings in said action, the decision of said court, the record and judgment appertaining to said action, the official stenographer's notes of the evidence and proceedings taken at the trial of the same, and the minutes of the clerk of said Court taken herein.

Honolulu, T. H. March 19th, 1904.

(Signed) CLINTON J. HUTCHINS, *Trustee*,
By CATHCART & MILVERTON,
His Attorneys.

- 385 To Messrs. Kinney, McClanahan & Cooper, Attorneys for William W. Bierce, Ltd., the above named plaintiff:

Notice.

You and each of you will please take notice that on Wednesday the 23rd day of March, A. D. 1904, at 9 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, we shall present the foregoing motion before the Hon. J. T. De Bolt, First Judge of the Circuit Court, First Circuit.

Dated Honolulu, T. H., March 21st, 1904.

(Signed)

CATHCART & MILVERTON,
Attorneys for Defendant.

Endorsed: L. No. 5782. 21/300. Circuit Court Third Circuit. (Transferred to 1st Circuit.) William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee. Replevin. Motion for New Trial. Filed March 21, 1904. George Lucas, Clerk. Cathcart & Milverton, Attorneys for Defendant, Honolulu.

- 386 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Plaintiff's Request for Findings of Fact and Conclusions of Law.

Findings of Fact.

1.

That William W. Bierce, Limited, plaintiff, and the Kona Sugar Company, Limited, on February 21st, 1900, entered into the contract of that date attached to the deposition of Columbus Bierce, read in evidence.

2.

That the personal property sued for in this action was duly shipped to Honolulu, bills of lading having been taken out in the name of the plaintiff, but said property did not pass into the possession of the Kona Sugar Company, Limited, until after the contract of March 13th, 1901, was entered into.

3.

- 387 That on March 13th 1901, plaintiff and the Kona Sugar Company, Limited, entered into the contract of that date attached to plaintiff's complaint as Exhibit "A."

4.

That the payment of \$10,000 under the contract of March 13th, 1901, and the giving of the note for \$37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was intended to be and was in settlement of the contract of February 21st 1900, and said cash and said note and bonds were not given nor were they intended as the consideration for the purchase price of the materials sued for.

5.

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was intended by the parties to be the payment of the note of \$37,044.53 given in settlement of the contract of February 21st 1900.

6.

That the contract of March 13th, 1901, was an entire contract, and intended so to be, for a lump sum consideration which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and non-lienable items thereof.

7.

That by entering into the contract of March 13th, 1901, the contract of February 21st, 1900, was intended to be settled and adjusted.

388

8.

That both the plaintiff and the Kona Sugar Company, Limited, intended said contract of March 13th, 1901, to operate as a conditional sale of the property sued for and not as a chattel mortgage, or an absolute sale with lien reserved in the vendor.

9.

That in view of all the circumstances of the case said contract of March 13th, 1901, was a conditional sale and not a chattel mortgage, or absolute sale with lien reserved in the vendor.

10.

That some of the property sued for in this action, including railroad rolling stock, was not in fact used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable.

11.

That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action.

12.

That plaintiff did not intend to and did not in fact waive its title by bringing the action to enforce a materialman's lien against the Kona Sugar Company, Limited, and its Receiver.

13.

That the acts of the plaintiff prior to the bringing of this action did not amount to a rescission of the contract of March 13th, 389 1901, and said contract as a matter of fact has not been rescinded.

14.

That the defendant attempted to purchase and did in fact take possession of the articles sued for, with knowledge both record and actual, of plaintiff's claim and title thereto.

15.

That the actual value of said articles sued for was, at the time of bringing this action and now is, the sum of \$22,000.

16.

That plaintiff has suffered damages from defendant's detention of the property in the sum of \$1,045.00 being interest at six per cent. on said sum of \$22,000 from June 1st 1903 to the date of Judgment herein.

17.

That each and every material allegation in plaintiff's J. T. D. complaint, [save as hereinabove qualified,]* has been established by the evidence.

The foregoing Findings of Fact *is* hereby allowed, this 19th day of March, 1904.

(Signed)

J. T. DE BOLT,

First Judge.

Endorsed: Law No. 5782. Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Defendant. Plaintiff's Request for Findings of Fact and Conclusions of Law. — — —, Judge. Filed M'ch 15th, 1904, P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for — — —. (Office No. —.)

[* Words enclosed in brackets erased in copy.]

390 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Plaintiff's Requested Conclusions of Law.

1.

That the defendant is not in a position to be able to deny or require proof of plaintiff's corporate existence.

2.

That the contract of February 21st, 1900, was adjusted and settled between the parties by the contract of March 13th, 1901.

3.

That the contract of March 13th, 1901, between plaintiff and the Kona Sugar Company, Limited, was a conditional sale and not a chattel mortgage or absolute sale with lien reserved in the vendor, and under it plaintiff held title to the property sued for.

4.

That the payment of \$10,000 under the contract of March 13th, 1901, and the giving of the note therein for \$37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was in settlement and adjustment of the contract of February 21st, 1900, and neither said cash or said note and bonds were given as a consideration for the purchase price of the materials sued for.

5.

391 That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for was the payment of the note of \$37,044.53 which had been given as one of the considerations for the settlement of the contract of February 21st, 1900.

6.

That the contract of March 13th, 1901 was an entire contract of a lump sum consideration and contained lienable and non-lienable items.

7.

That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action.

8.

That plaintiff is entitled to judgment against the defendant for the return of the property sued for and damages for its detention, and in the event of defendant's inability to return the said property, plaintiff is entitled to judgment for \$22,000 its value, and also damages for its detention.

The foregoing Conclusions of Law is hereby allowed this 19th day of March, 1904.

(Signed)

J. T. DE BOLT,
First Judge.

Endorsed: 21/300 Law No. 5782. Circuit Court, Third Circuit Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Defendant. Plaintiff's Requested Conclusions of Law. ———, Judge. Filed M'ch 15th, 1904, P. D. Kellett, Jr. Clerk. Kinney, McClanahan & Cooper 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

392 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Decision.

The Court having heard the above entitled cause does hereby find for the plaintiff for the recovery of the following property:

362 tons of steel T rails weighing 35 pounds to the yard.

Joints for laying 550 tons of steel T rails.

Railroad track spikes to lay 550 tons of said rails.

10 set- of 35 pound split switch material, complete.

16 railway cars 25 feet long, 7 feet wide for 3 ft. gauge track.

One 9 x 14 Class "A" saddle tank locomotive.

One 10 x 16 back saddle tank locomotive.

One Howe Narrow gauge track scale, capacity 25 tons.

One set re-railers.

Four track gaugers, 3 feet.

One rail bender.

One track drill.

One section car with seats.

Two Jacks.

Together with damages for its detention from the 1st day of June 1903 to the date hereof, and in the event of the inability and failure of the defendant to forthwith make return of said property to the plaintiff, that the plaintiff shall have judgment for the

value of said property found to be the sum of \$22,000 and damages for its detention from the 1st day of June 1903, found to be the sum of \$1,045 and the costs of this action.
Dated Honolulu, March 19th, A. D. 1904.

(Signed)

J. T. DE BOLT,
*First Judge of the Circuit Court of the
First Judicial Circuit.*

Endorsed: Law No. 5782. Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Defendant. Decision. ———, Judge. Filed M'ch 19th, 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

394 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Judgment.

This cause by stipulation of parties and consent of the above entitled Court coming on regularly to be heard at the January 1904 Term of the Circuit Court of the First Judicial Circuit, before the Honorable John T. De Bolt, on the 7th day of March, A. D. 1904, and by stipulation of parties and consent of Court a jury having been waived and the above named plaintiff being present represented by its attorneys Messrs. Kinney, McClanahan & Cooper, and the above named defendant being present represented by his attorneys John W. Cathcart, Esq., and Messrs. Castle & Withington, and said cause proceeding to trial on said last named day and continuing until Saturday the 12th day of March, 1904, and the Court having heard the evidence adduced by the respective parties and being fully advised in that respect and argument having been made by the respective counsel, and the Court being advised in all ways in the premises and having at the close of said argument rendered a decision in favor of the plaintiff and against the defendant for the return of the property sued for in said action together with damages for its detention

395 from the 1st day of June 1903 to the date hereof, or in default to make return of said property that said plaintiff recover the value thereof shown to be the sum of \$22,000 together with damages as aforesaid for its detention;

Now therefore, it is ordered and adjudged that the above named defendant Clinton J. Hutchins, Trustee, forthwith return into the possession of William W. Bierce Limited or its authorized agent or

attorneys the following described personal property now in the possession of said defendant:

362 tons of steel T rails weighing 35 pounds to the yard
 Joints for laying 550 tons of steel T rails
 Railroad track spikes to lay 550 tons of said rails
 10 set- of 35 pound split switch material, complete
 16 railway cars 25 feet long, 7 feet wide for 3 ft. gauge track
 One 9 x 14 Class "A" saddle tank locomotive
 One 10 x 16 back saddle tank locomotive
 One Howe narrow gauge track scale, capacity 25 tons
 One set re-railers
 Four track gaugers, 3 feet
 One rail bender
 One track drill
 One section car with seats
 Two Jacks

and that said William W. Bierce Limited, do have and recover from said Clinton J. Hutchins Trustee, the sum of \$1045.00 as damages for the detention of said property from the 1st day of June 1903, to the date hereof, together with the costs of this action taxed at the sum of \$50.50.

And it is further ordered and adjudged that on failure of the said defendant Clinton J. Hutchins, Trustee, to forthwith make such return of said property to the possession of said plaintiff; that said Plaintiff William W. Bierce Limited have and recover from the said defendant Clinton J. Hutchins, Trustee the value of said property found and adjudged herewith to be the sum of \$22,000 together with damages for its detention from the 1st day of June 1903 to the date hereof found and adjudged to be the sum of \$1,045.00 together with the costs of this action taxed at the sum of \$50.50.

Witness the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit.

Dated, March 19th, 1904.

[By the Court.]*

(Signed)

[Clerk.]*

J. T. DE BOLT.

First Judge.

Endorsed: Law No. 5782. Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff vs. Clinton J. Hutchins, Defendant. Judgment. ———, Judge. Filed M'ch 19th, 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

[* Words enclosed in brackets erased in copy.]

397 In the Circuit Court of the Third Judicial Circuit (Transferred to First Circuit), Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Order.

Plaintiff having in open Court at the hearing of defendant's motion for a new trial herein on March 23rd 1904, objected to the sufficiency of defendant's bond on said motion and on appeal and it appearing to the Court that said objection is well taken and should be sustained,

Now therefore it is hereby Ordered that said objection be sustained and that said defendant file a sufficient bond in a sum not less than the amount of the judgment herein on or before March 31st, 1904, in place of said bond before mentioned.

March 23rd, 1904.

(Signed)

J. T. DE BOLT,
*First Judge of the Circuit Court
of the First Circuit.*

Indorsement: Law No. 5782. Circuit Court, First Circuit, Territory of Hawaii. Wm. W. Bierce, Ltd., Plaintiff vs. Clinton J. Hutchins, Trustee, Defendant. Order for New Bond. J. T. De Bolt, Judge. Filed M'ch 23rd 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for Plaintiff. (Office No. —.)

398 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Notice.

To Messrs. Cathcart & Milverton and Messrs. Castle & Withington, Attorneys for Defendant:

Please take notice that the attached motion will be presented to the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit, on Friday the 25th day of March A. D.

1904, at 9 o'clock A. M. of said day or as soon thereafter as counsel can be heard.

Dated March 22nd, 1904.

(Sig.) KINNEY, McCLANAHAN & COOPER,
E. B. M.,
Attorneys for William W. Bierce, Ltd.

399 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion.

Now comes the above named plaintiff, by its attorneys, Kinney, McClanahan & Cooper, and moves this Honorable Court for an order requiring defendant to forthwith file in this cause a new re-delivery bond; or failing in which

That execution issue on the judgment herein, unless defendant file a bond in double the sum of the Judgment herein as provided by Section- 17 and 19 of Act 32 of the Session Laws of 1903;

This motion is based on the record in this cause including defendant's redelivery bond, and on the affidavits of E. B. McClanahan, John F. Colburn and Percy M. Pond, hereto annexed referred to and made a part hereof.

Dated March 22nd, 1904.

(Sig.) WILLIAM W. BIERCE, LIMITED,
By KINNEY, McCLANAHAN & COOPER,
E. B. M.,
Its Attorneys.

400 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903 Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Affidavit of E. B. McClanahan.

HONOLULU, OAHU,
Territory of Hawaii, ss:

E. B. McClanahan, being first duly sworn on oath deposes and says:

That he is a member of the firm of Kinney, McClanahan & Cooper,

attorneys for the plaintiff in the above cause; that he is acquainted with the facts and circumstances of the case; that part of the rails sued for in said action have, by means of part of the railroad spikes sued for therein, become attached to wooden sleepers fixed on land belonging to the Kapiolani Estate Limited, J. D. Paris, the Bishop Estate and others; that said Kapiolani Estate Limited, J. D. Paris, and the Bishop Estate have, since the trial of said action, declared to affiant, that neither the Kona Sugar Company, Limited, or the said defendant C. J. Hutchins, Trustee, have any right, title or interest, written or otherwise, in or to their respective lands or any part thereof over and upon which said rails lie and are so affixed, and that in the event of the judgment in this action being sustained by the

401 Supreme Court, any attempt on the part of said C. J. Hutchins, Trustee, or any one acting on his behalf, to remove said rails or make a re-delivery thereof to the said William W. Bierce Limited, or any one acting on its behalf, will be stopped, opposed and contested by legal proceedings in the Courts of this Territory.

That affiant avers that the said defendant, Clinton J. Hutchins, Trustee, is wholly unable to respond to the plaintiff in damages on the alternative judgment rendered herein; that defendant's re-delivery bond filed herein is of doubtful value in that it is a question whether under the terms thereof, a suit can be maintained against the Estate of Henry Waterhouse, deceased, the said Henry Waterhouse being a surety on said bond who has since its execution, died; that in any event it would be necessary for plaintiff in suing on said bond to elect between a suit against the said Estate of Henry Waterhouse and a suit against the other surety on said bond, and by such forced election plaintiff would be deprived of its right under the law (See Section 1705 Civil Laws) to a claim against and a right to have two, at least, sufficient sureties on defendant's re-delivery bond.

That affiant is informed and verily believes, that A. B. Wood one of the sureties on said bond has, since its execution, disposed of a large part of his property in this Territory, and at this time is not the owner of sufficient property, subject to execution, as would satisfy a judgment which might be had against him in a suit on said re-delivery bond; that said A. B. Wood has left the Territory of Hawaii, and affiant is informed and believes that said A. B. Wood has left this Territory permanently.

That in an action now pending in this Court between the Capital Building Company, as plaintiff, and Henry Waterhouse and A. B.

402 Wood, as defendant, a subpoena was issued and served upon said A. B. Wood prior to his said departure from this Territory; that in defiance of said subpoena, which required the attendance of said Wood as a witness in said cause on April 4th, 1904, he the said Wood left this jurisdiction with no intention of obeying the mandate of said subpoena, which course on the part of said Wood is evidence of his intention of remaining permanently out of this Territory.

That the hearing on the probate of the Will of said surety Henry Waterhouse, is set for Monday April 4th, 1904, before this Honor-

able Court, and affiant is informed and believes it to be true that the statutory notice to creditors of said Estate will be first published on said April 4th, 1904; that there can be no claim under said re-delivery bond against the Estate of said surety Henry Waterhouse until after said defendant Clinton J. Hutchins Trustee, has failed to make a re-delivery of the property sued for; that said defendant intends to and is now perfecting exceptions to the Supreme Court in said action, and will not deliver or attempt to deliver to the plaintiff said property, until said exceptions have been passed upon by the Supreme Court of the Territory that, judging from the personal experiences of affiant in a somewhat extensive practice before the said Supreme Court in matters similar to the present case, and the present congested condition of the calendar of said Supreme Court, it will be more than six months after the 4th of April 1904, before a decision on defendant's proposed exceptions can be had, and therefore plaintiff's *inchoate* claim against the said Estate of Henry Waterhouse on said re-delivery bond, which would only become absolute sometime after a decision adverse to the defendant, would be barred, and plaintiff's remedy and right of action against said Estate wholly lost.

403 That affiant verily believes that defendant will not and cannot make a re-delivery of said materials sued for either now or at any other time; that though at the date of the execution of said re-delivery bond, both the sureties thereon were sufficient, affiant avers that at this time said A. B. Wood is an insufficient surety on said bond as well as Henry Waterhouse, and that said Clinton J. Hutchins, Trustee is not the owner of sufficient property to respond to the alternative judgment rendered in this action.

(Signed)

E. B. McCLANAHAN.

Subscribed and sworn to before me this 23rd day of March, A. D. 1904.

(Signed)

GUSSIE H. CLARK,

[SEAL.]

Notary Public, First Judicial Circuit.

404 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Affidavit of John F. Colburn.

HONOLULU, OAHU,
Territory of Hawaii, ss:

John F. Colburn, being first duly sworn on oath, deposes and says:

That he is the Treasurer and Manager of the Kapiolani Estate

Limited; that said Kapiolani Estate Limited is the owner of certain lands formerly forming a part of lands occupied for plantation purposes by the Kona Sugar Company, Limited, at Kailua, on the Island of Hawaii, Territory of Hawaii; that on a portion of said lands of said Kapiolani Estate Limited, rails forming part of the plantation railroad of the said Kona Sugar Company, Limited, have been affixed to the soil, and affiant claims said rails on behalf of the Kapiolani Estate Limited, as a part of the freehold; that neither said Kona Sugar Company, Limited, Clinton J. Hutchins, Trustee, or any one else, has any interest, right or title in or to the lands of said Kapiolani Estate Limited, upon which said rails lie, nor has said Kona Sugar Company, Limited, Clinton J. Hutchins, Trustee, or any one else, any right, title or interest in or to said rails, but that

405 said rails are a part of the freehold and are claimed by the said Kapiolani Estate Limited; that any attempt on the part of the Kona Sugar Company, Limited, Clinton J. Hutchins, Trustee, or any one else, or any one acting for or on their behalf to remove or interfere with said rails so affixed, will, by the said Kapiolani Estate Limited, be contested by legal proceedings brought for that purpose, and the claim of title and right of possession to said rails will be at all times asserted and defended by the Kapiolani Estate Limited.

That said rails referred to in this affidavit are a part of the property which affiant avers is the subject matter of a certain suit between "William W. Bierce Limited, as plaintiff, and Clinton J. Hutchins, Trustee, as defendant" recently tried before the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit.

(Signed)

JOHN F. COLBURN.

Subscribed and sworn to before me this 23rd day of March A. D. 1904.

(Signed)
[SEAL.]

GUSSIE H. CLARK,
Notary Public, First Judicial Circuit.

406 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Affidavit of Percy M. Pond.

HONOLULU, OAHU,
Territory of Hawaii, ss:

Percy M. Pond, being first duly sworn on oath deposes and says:
That for some years he has been intimately associated in business

G. H. C. with A. B. Wood, one of the sureties on the re-delivery bond filed in the above entitled action; that he knows the property belonging to said A. B. Wood within this jurisdiction; that the said A. B. Wood at the time of the execution of said bond possessed property within this jurisdiction, subject to execution, of more than the value of \$25,000; that since the date of the execution of said bond, said Wood has disposed of the larger part of his property within this jurisdiction, and at this time is not the owner of property within this jurisdiction, subject to execution, of the value of more than \$10,000.00.

That since the execution of said re-delivery bond, the said A. B. Wood has removed from the Territory of Hawaii with his
407 family and does not intend longer to reside within said Territory.

(Signed)

PERCY M. POND.

Subscribed and sworn to before me this 23rd day of March A. D. 1904.

[SEAL.]

(Signed)

GUSSIE H. CLARK,

Notary Public, First Judicial Circuit.

Endorsed: Law. No. 5782. 21/300. Circuit Court First Circuit Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Motion. ———, Judge. Filed March 24, 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

408 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December Term, 1903.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Order Requiring Defendant to File New Re-delivery Bond.

This matter having been brought on by motion of the plaintiff and coming on for hearing on this 28th day of March, A. D. 1904. and the defendant having filed an affidavit against the allowance of said motion and argument having been made by respective counsel, and the Court being advised in the premises, and having decided that the present re-delivery bond is insufficient;

It is ordered that the above named defendant Clinton J. Hutchins, Trustee, do file in this cause a new re-delivery bond with two sufficient sureties.

P. D. K., Jr. A on or before the 2nd day of April, A. D. 1904.

Dated March 28th, A. D. 1904.

(Signed)

J. T. DE BOLT,

First Judge of the Circuit Court of the

First Judicial Circuit.

Endorsed: Law. No. 5782. Circuit Court First Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Order Requiring Defendant to File New Delivery Bond. ———, Judge. Filed March 29th, 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

409 In the Circuit Court of the Third Judicial Circuit (Transferred to First Judicial Circuit), Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Order Extending Time for Defendant to File New Delivery Bond.

Upon application of Clinton J. Hutchins, Trustee, and on reading — filing his affidavit herein; good cause being thereto shown;

It is ordered that said defendant Clinton J. Hutchins, Trustee, do have further time, to wit, up to [and including the]* 9 A. M. the 6th day of April, A. D. 1904, to file in this cause a new re-delivery bond with two sufficient sureties as by this court required on the 28th day of March, A. D. 1904.

Dated, this 2nd day of April, A. D. 1904.

(Signed)

J. T. DE BOLT,
First Judge, First Circuit.

Endorsed: Circuit Court, Third Circuit, (Transferred to 1st Circuit) Territory of Hawaii. William W. Bierce, Limited, a Corporation, Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Order. L. 5782. 21/300. Filed April 2, 1904. Henry Smith, Clerk. Cathcart & Milverton, Attorneys for Defendant, Honolulu, T. H.

410 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Notice.

To Messrs. Cathcart & Milverton, Attorneys for Defendant:

Please take notice that the attached motion will be presented to the Honorable John T. De Bolt, First Judge of the Circuit Court of

[* Words enclosed in brackets erased in copy.]

the First Judicial Circuit on Friday the 8th day of April, A. D. 1904, at 9 o'clock A. M. of said day or as soon thereafter as counsel can be heard.

Dated, Honolulu April 6th, 1904.

(Sig.) WILLIAM W. BIERCE, LTD.,
By KINNEY, McCLANAHAN & COOPER,
E. B. M.,
Its Attorneys.

411 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion.

Now comes the above named plaintiff, by its attorneys Kinney, McClanahan & Cooper, and moves for the issuance of an execution on the judgment heretofore rendered herein on the grounds set forth in the affidavit of E. B. McClanahan hereto attached and the further ground that the said defendant has failed to comply with the order of this Honorable Court made on the 28th day of March 1904, and modified on the 2nd day of April 1904, such modified order requiring the said defendant to give a new re-delivery bond in a sum of \$30,000 on or before 9 o'clock a. m. of Wednesday April 6th, 1904;

Unless within such time as shall be fixed by this Honorable Court, said defendant deposit herein a bond in double the amount of said judgment with such sureties as shall be approved by this Court conditioned for the prosecution of the exceptions taken herein without delay, and for the performance or payment of the said judgment or such part thereof as may be rendered or affirmed by the Supreme Court on such exceptions.

412 This motion is based upon Sections 17 and 19 of Act 32 of the Session Laws of 1903 as well as the record in this cause including all motions, affidavits and orders, and the affidavit of P. D. Kellett and E. B. McClanahan attached hereto and made a part hereof.

Dated April 6th, 1904.

(Sig.) WILLIAM W. BIERCE, LTD.,
By KINNEY, McCLANAHAN & COOPER,
E. B. M.,
Its Attorneys.

413 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Affidavit of P. D. Kellett, Jr.

HONOLULU, OAHU,
Territory of Hawaii, ss:

P. D. Kellett being first duly sworn on oath deposes and says:

That he is one of the clerks of the Circuit Court of the First Judicial Circuit; that he is familiar with the above entitled cause; that the above named defendant has not filed in said Court the re-delivery bond required by the order of the above entitled Court made on the 28th day of March, 1904, and modified by an extension of time on the 2nd day of April, 1904.

(Signed)

P. D. KELLETT, JR.

Dated, April 6th, 1904.

Subscribed and sworn to before me this 6th day of April, 1904.

(Signed)

GEORGE LUCAS, *Clerk.*

[*Notary Public, First Judicial Circuit.*]*

414 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Affidavit of E. B. McClanahan.

HONOLULU, OAHU,
Territory of Hawaii, ss:

E. B. McClanahan being first duly sworn on oath deposes and says:

That he is a member of the firm of Kinney, McClanahan & Cooper, attorneys for the above named plaintiff, and as such has had the conduct of this action, and is familiar therewith and with the

[* Words enclosed in brackets erased in copy.]

proceedings therein; that the order of the above entitled Court made on the 28th day of March, 1904, and modified by an extension of time on the 2nd day of April, 1904, requiring the above named defendant to give a new re-delivery bond in said cause on or before 9 o'clock A. M. of Wednesday the 6th day of April, 1904, has not been complied with by said defendant.

That the property which is the subject matter of the above entitled action has been and now is being used by said defendant as a part of the plantation railway and equipment of the sugar plantation purchased by the defendant at a Receiver's sale of the property of the Kona Sugar Company, Limited, held at Kailua, Hawaii, on the 9th day of May, 1903. That the sugar mill of said plantation was at the time of said sale and now is situate on land leased from the Kapiolani Estate Limited as Lessor, but that since the judgment rendered herein, the lease of said mill site property has by said Lessor been declared forfeited for breach of covenants in said lease contained, and said defendant has been ousted from his possession of said mill and said mill site property, and the same is now wholly out of his control and possession, and in the possession and control of said Kapiolani Estate Limited; and affiant is informed and believes it to be true that no beneficial use can be made of said railroad or its equipment as now located without the use and possession of said mill; that the growing cane on said plantation can be ground only at said mill and only by the use of said railroad and equipment, can such cane be transported to said mill for grinding purposes; that without the use and possession of said mill said railroad cannot be used in connection with said plantation and will of necessity suffer damage and deterioration.

That on the 4th day of April, 1904, defendant was served with process in a certain suit in equity brought against him in the Circuit Court of the First Judicial Circuit, and a temporary injunction issued against the use or disposal of the property, and the acquisitions therefrom acquired by him at said Receiver's sale and praying for the appointment of a Receiver; that affiant avers on information and belief that the said defendant is wholly unable to respond to a money judgment in the sum of the judgment had herein:

That affiant is informed and believes that the best of the lands and the major part thereof forming the said sugar plantation are held by defendant under leases, and that the terms of such leases have expired or are being continued under the understanding that they will be declared at an end and forfeited in the event of the failure to re-habilitate said plantation; that by reason of litigation, diversity of interests and lack of finances and the matters and things set forth and shown in this affidavit, the affairs of the said sugar plantation are in a deplorable condition; that for some months past said defendant has been endeavoring to secure funds and enlist capital for the straightening of the affairs and the re-habilitation of said sugar property, but without success; and that unless such financial assistance be secured the only remaining alternative for the defendant in connection with his interests therein, is to wreck

said plantation and convert into money what property of value there may be there at his disposal.

And affiant verily believes that because of the involved condition of the affairs of the said sugar property no re-habilitation of said property can be accomplished, and that defendant's every effort in that way will be futile.

And affiant further avers that if said defendant is unable to put said railway and railway equipment to a beneficial use, it will suffer great damage unless cared for and that the care of said property, such as would prevent deterioration, would be so expensive that it would be beyond the defendant's financial ability;

That the larger part of said railroad lies on land to which
417 defendant has no title and if said re-habilitation cannot be accomplished defendant will be open to the liability of being required by the owners of said lands, at any time, to remove said railway and railway equipment from such lands, and affiant verily believes that in such event the cost of such removal as well as the cost of such care of said property so removed as would arrest deterioration would be so great as to be beyond the financial ability of said defendant.

(Signed)

E. B. McCLANAHAN.

Subscribed and sworn to before me this 6th day of April, A. D. 1904.

(Signed)

GEORGE LUCAS, *Clerk*.

[*Notary Public, First Judicial Circuit.*]*

Endorsed: 21/300. Law No. 5782. Circuit Court, First Circuit, Territory of Hawaii, William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Notice, Motion and Affidavits. ———, Judge. 21/300. Filed April 6th, 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

418 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Order.

The above named plaintiff, by its attorneys, having on the 6th day of April 1904 filed in this Court a motion for the issuance of execution on the judgment heretofore rendered herein, and said motion having been duly presented and argued on this 8th day of

[* Words enclosed in brackets erased in copy.]

April 1904, both parties being represented by counsel, and it appearing to the Court that good cause has been shown for the granting of said motion;

Now therefore, it is ordered that execution issue on said judgment according to the terms thereof, unless the above named defendant Clinton J. Hutchins, Trustee deposit with the Clerk of

Friday

this Court on or before the hour of 9 o'clock A. M. of [Monday]*
15

P. D. K., Jr. April [11]*th 1904, a bond in not less than double the amount of said judgment with sureties to be approved by this Court, conditioned for the prosecution of the exceptions had herein without delay, and for the performance and payment of the judgment or part thereof which may be
419 rendered on said exceptions by the Supreme Court.

Dated April 8th, 1904.

(Signed)

J. T. DE BOLT,
*Judge of the Circuit Court of
the First Judicial Circuit.*

Issued Execution on this Order April 15, 1904 at 9.40 a. m.

(Signed) HENRY SMITH,
Clerk Jud. Dept.

Endorsed: Law. No. 5782. Circuit Court. Third Circuit. Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Order. ———, Judge. Filed April 8th, 1904. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for ———. (Office No. —.)

420 Received May 21, 1904, at 10 a. m. (Sig.) J. K. Nahale,
N. Kona, H.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Execution.

THE TERRITORY OF HAWAII:

To the High Sheriff of the Territory of Hawaii or his Deputy;
the Sheriff of the Island of Hawaii or his Deputy:

Whereas, William W. Bierce Limited, did, heretofore, in the Circuit Court of the Third Judicial Circuit bring a certain action of

replevin against Clinton J. Hutchins Trustee, to recover the possession of certain railroad material equipment and accessories, (hereafter more particularly described) and did in such action file a replevin bond in the sum of \$30,000; and,

Whereas, after the seizure of said property by virtue of said bond, the defendant Clinton J. Hutchins Trustee, did retake the possession thereof by reason of having given a redelivery bond as required by law; and,

Whereas, said action being at issue, was by agreement of parties and consent of Court transferred for trial to the Circuit Court of the First Judicial Circuit; and,

Whereas, by further agreement of respective counsel, said action came on for trial before the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit, jury waived; and,

421 *Whereas*, a trial having been had, and judgment in said action rendered on the 19th day of March 1904 in favor of plaintiff, William W. Bierce Limited and against the defendant, Clinton J. Hutchins, Trustee, for the return of said property to the possession of William W. Bierce Limited, or its authorized agent or attorney, together with the sum of \$1,045 found as damages for the detention of said property together with the costs of this action taxed at the sum of \$50.50, and in default to make return of said property then and in that event said William W. Bierce Limited to have and recover from said defendant Clinton J. Hutchins, Trustee, the value of said property found and adjudged to be the sum of \$22,000 together with said damages and costs, and,

Whereas, subsequently on the 28th day of March said defendant was ordered to file a new re-delivery bond on or before the 1st day of April A. D. 1904, which time was subsequently extended to the 6th day of April 1904; and,

Whereas, on the 8th day of April 1904, said defendant being in default, in compliance with said order of the 28th day of March, execution was ordered to issue on said judgment unless said defendant on or before the hour of 9 o'clock of Friday the 15th day of April 1904 deposit in Court a bond in not less than double the amount of said judgment with sureties to be approved by the Court conditioned for the prosecution of the exceptions had therein without delay and for the performance and payment of the judgment or part thereof which may be rendered on said exceptions by the Supreme Court; and,

Whereas, said time has elapsed and the defendant has failed to file such bond.

Now therefore, you are commanded to forthwith proceed to seize and take possession of the following described property being
422 the property covered by said judgment and situate at Kailua on the Island of Hawaii, Territory of Hawaii.

362 tons of steel T rails weighing 35 pounds to the yard

Joints for laying 550 tons of steel T rails

Railroad track spikes to lay 550 tons of said rails

10 set- of 35 pound split switch material, complete

16 railway cars 25 feet long 7 feet wide for 3 ft. gauge track
 One 9 x 14 Class "A" saddle tank locomotive
 One 10 x 16 back saddle tank locomotive
 One Howe Narrow gauge track scale, capacity 25 tons
 One set re-railers
 Four track gaugers, 3 feet
 One rail bender
 One track drill
 One section car with seats
 Two Jacks

And having taken such possession to deliver the same to William W. Bierce, Limited, or its authorized agent or attorney.

And you are further commanded that in the event you cannot secure possession of said property, you are to levy upon the personal property of Clinton J. Hutchins, Trustee, defendant in the above entitled action, and if sufficient cannot be found, then upon his real property, and giving 30 days' previous notice as required by law to sell the same or as much thereof as may be found necessary at public sale to the highest bidder in order to satisfy the alternative judgment of \$22,000 had herein.

And you are further commanded in any case to levy upon the personal property of said Clinton J. Hutchins, Trustee, and if sufficient cannot be found then upon his real property, and giving 30 days' previous notice as required by law to sell the same, or so much thereof as may be found necessary at public sale to the highest bidder in order to satisfy said judgment rendered against him in favor of said

William W. Bierce Limited on said 19th day of March A. D. 1904, for damages and costs as follows:

Damages	\$1,045
Costs of Court	50.50
Judgment entered for	1,095.50
Interest on \$23,095.50 from entry of judgment to date...	98.70
	<hr/>
Costs of execution	4.00
	<hr/>
Total	\$1198.20

And collect also legal interest thereon from date hereof with your costs and expenses and make return of this writ within sixty days, with the proceeds by you collected.

Hereof fail not at your peril.

Witness the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit this 15th day of April A. D. 1904.

(Signed)
[SEAL.]

HENRY SMITH,
 Clerk of the Circuit Court of the First Circuit
 and of the Judiciary Department of the Ter-
 ritory of Hawaii.

Indorsement: Law No. —. Circuit Court, First Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff vs. Clinton J. Hutchins, Trustee, Defendant. L. 5782. 21/300. Execution. —, —, —. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for —. (Office No. —.)

I hereby certify on this 23rd day of May M. H. 1904 at North Kona, Hawaii, I return this Writ of Execution unsatisfied being unable to levy upon the properties therein described. Dated Kailua, May 23rd, 1904. J. K. Nahale, Deputy Sheriff N. Kona, H.

Returned to Office by H. E. Cooper May 27, 1904. J. A. Thompson, Clerk.

Law No. 6023. Plaintiff's Exhibit Q. Filed May 8th 1908. Job Batchelor, Clerk.

424 In the Circuit Court, First Circuit of the Hawaiian Islands, Jan'y Term, 1904.

Bef. De Bolt, J.

Dated Monday, March 7th, 1904, 9.30 A. M.

WM. W. BIERCE, LTD.,

vs.

CLINTON J. HUTCHINS, Trustee.

Replevin.

Clerk's Minutes.

Transferred from Third Circuit.
Hearing on Motion to Amend Complaint.

Present: Kinney, McClanahan & Cooper for Pl'ff. J. W. Cathcart for Def't. J. L. Horner, Stenographer.

Mr. McClanahan presents the Motion.

Mr. Cathcart argues objecting to the Motion.

The Court grants the Motion and allows the Amendments the same to be made by the Clerk.

Mr. Cathcart notes an exception to the ruling of the Court allowing the Motion also for allowing the amendments to be made interlineations.

Counsel in open Court agrees & stipulate to waive the trial of this case by a Jury.

The Court thereupon finding that there is nothing for the Jury to do, excuses the Jury until 10 a. m. on Wednesday.

Upon motion of Mr. Cathcart, the Court orders the firm name of Castle & Withington and W. L. Whitney to be entered of record as associate counsel for Def't.

Mr. McClanahan reads the Complaint as amended.

425 Mr. Cathcart states & asks that the Original Answer to stand as the Answer of Def't to the Complaint as Amended; to which counsel for Pl'ff consents, & it is so ordered by the Court.

Mr. Cathcart reads the Answer.

Mr. McClanahan makes an opening statement of his case to the Court after which he offers in evidence.

Articles of Incorporation of William W. Bierce, Limited.

Mr. Cathcart objects to the offer & argues.

Mr. McClanahan argues, after which he withdraws the offer.

Mr. McClanahan reads Stipulation filed Nov. 11th, 1903, that the interrogatories propounded to Columbus Bierce and Harry T. Gilbert in the case of R. W. McChesney, et al. v. Kona Sug. Co. et al. in the Third Circuit Court may be used by the pl'ff in the above cause with the same force & effect as if taken in the above cause.

Mr. McClanahan offers in evidence:

Deposition of Columbus Bierce & then reads the same.

P's Exh. "B." Letter or Bid dated Febr'y 21st 1900 by Wm. W.

Bierce Ltd. to Kona Sugar Co.,

" " "A." Power or Authorization of Frank Davies dated Dec. 23, 1899,

" " "C." Resolution of the Board of Directors of Wm. W. Bierce Ltd. dated 5th April, 1901,

" " "D." Contract dated M'ch 13, 1901, between Kona Sug. Co. Ltd. and Wm. W. Bierce, Ltd.,

" " "E." Promissory Note dated M'ch 13, 1901, for \$37,044.53 by the Kona Sugar Co. Ltd. to Wm. W. Bierce, Ltd.

At 12 M. the Court takes a recess until 2 P. M.

Afternoon Session, 2 p. m.

Before De Bolt, J.

Same Counsel & Stenographer.

Mr. McClanahan, after making a statement with reference to Pl'ff's election, proceeds with the reading of the Deposition of Columbus Bierce.

426 Mr. McClanahan offers in evidence & reads Deposition of Harry T. Gilbert.

P's Exh. "F"—Demand dated July 18th, 1903, by Kinney & McClanahan, Att'ys for Wm. W. Bierce, Ltd., to C. J. Hutchins, Trustee.

Mr. McClanahan calls as witnesses, Robert W. Shingle, Sworn;

Mr. McClanahan offers in evidence & reads Deposition of Alexander Lindsay, Jr.,

P's Exh. "G"—Protest of Wm. W. Bierce;

J. M. McChesney, Sworn.

Mr. McClanahan tenders in open Court Bonds Nos. 1-76 inclusive

of the Kona Sugar — Ltd. for \$500 each, and the Note of the Kona Sugar Co. Ltd. for \$37044.53 dated Mch. 13, 1901.

Mr. Cathcart objects to the tender & argues.

Mr. McClanahan argues.

The Court overrules the objection & Mr. Cathcart excepts.

George Lucas, Sworn;

Mr. McClanahan offers in evidence papers in the case of *In Re McChesney & Sons v. The Kona Sugar Co. Ltd. et al.* instituted in the 3rd Circuit Court Eq. #1347 reading the particular paper he desires to offer.

F. L. Dortch, sworn; Henry Smith, Sworn;

Mr. McClanahan offers in evidence

P.'s Exh. "H"—Act 36 of Acts & Resolution passed by The General Assembly of the State of Louisiana at the Regular Session, begun & held at the City of Baton Rouge on the 14th day of May, 1888, & which adjourned on Thursday the 12th day of July, A. D. 1888.

Mr. Cathcart objects to the offer & argues.

Mr. McClanahan argues.

The Court admits the Act in evidence & — is marked Pl'ff's Exh. "H."

428 Mr. Cathcart notes an exception.

William W. Bierce, Sworn.

At 4 P. M. the Court continues the hearing until 10 a. m. tomorrow & then adjourns for the day until 9 a. m. tomorrow.

(Signed)

P. D. KELLETT, Jr., Clerk.

428

TUESDAY, *March 8th*, 1904—10:45 a. m.

Before De Bolt, J.

L. 5782.

Continued from the 7th inst.

Present:

Kinney, McClanahan & Cooper and S. H. Derby for Pl'ff.

J. W. Cathcart and W. L. Whitney for Def't.

J. L. Horner, Stenographer.

Mr. McClanahan resumes with the Direct-examination of William W. Bierce.

Mr. McClanahan files for Identification: Exh. "AA" Copy Articles of Incorporation of William W. Bierce, Ltd., dated Dec. 2, 1899.

At 12 M. the Court takes a recess until 2 P. M.

In the Circuit Court, First Circuit of the Hawaiian Islands, January Term, 1904.

Bef. De Bolt, J.

Dated Tuesday, March 8th, 1904.

L. 5782.

WILLIAM W. BIERCE, LTD.,
vs.
CLINTON J. HUTCHINS, Trustee.

Continued.

Clerk's Minutes.

Afternoon Session, 2 p. m.

Before De Bolt, J.

Same Counsel & Stenographer are present.

Mr. Cathcart resumes with the Cross-examination of William W. Bierce.

M. F. Scott, Sworn.

429 Mr. McClanahan asks leave of the Court as well as Counsel for Def't that the papers in the case of McChesney & Sons v. Kona Sug. Co., that were admitted in evidence in this case, be taken as read: No objections, it is so considered.

Mr. McClanahan asks leave to amend the complaint so as to conform to the proof, to wit: in Exhibit A, attached to the complaint, second page by substituting "J. M. McChesney" for "F. W. McChesney" and by adding thereto the words "By its Treasurer F. W. McChesney."

No objections, the Court allows the Amendment.

E. B. McClanahan, sworn.

Mr. McClanahan offers in evidence:

P.'s Exh. 1—Minutes produced from the custody of the Def't of Kona Sugar Co., Directors' Meeting of March 16th, 1901, on p. 45.

Pl'ff rests.

Mr. Cathcart moves to strike out certain portions of Columbus Bierce's Deposition reading same & taken down by the Stenographer & argues.

Mr. McClanahan argues.

The Court denies the Motion.

Mr. Cathcart notes an exception.

Mr. Cathcart further moves to strike out Interrogatory 41 & Answer thereto of C. Bierce.

Same ruling & exception.

Mr. Cathcart makes an opening statement of his case to the Court after which he offers in evidence:

D.'s Exh. 1—Certified Copy of the Order & Motion made by the Pl'ff in this case preliminary to the bringing of the action to enforce Materialman's Lien.

430 D.'s Exh. "2"—Certified copy of the Complaint on the Mechanic's Lien filed August 1st, 1902.

D.'s Exh. "3"—Certified copy of Petition of Wm. W. Bierce, Ltd., in Intervention.

At 3:55 P. M. the Court continues the hearing until 9:30 a. m. tomorrow & then adjourns until 9 a. m. tomorrow.

(Signed)

P. D. KELLETT, JR., *Clerk.*

431 SATURDAY, *M'ch 12th*, 1904—10 a. m.

Before De Bolt, J.

Continued from the 11th inst.

Same counsel are present.

Mr. Cathcart replies.

Mr. McClanahan replies.

The Court renders an oral decision finding for the Pl'ff to recover the property as set out in the complaint and [damages in the sum of \$23000]* failing the recovery fixes the value of said property at (\$22,000)

\$22000.—on the 1st of June, 1903, and damages interest on said value at the rate of 6% from said June 1st 1903 and costs.

Mr. Cathcart excepts to the Judgment of the Court as being contrary to the law & evidence & the weight of evidence and gives notice of Motion for New Trial.

At 11:23 a. m. the Court adjourns until 9 a. m. on Monday.

(Signed)

P. D. KELLETT, JR., *Clerk.*

432 In the Circuit Court, First Circuit, of the Hawaiian Islands, Jan'y Term, 1904.

Bef. De Bolt, J.

Dated Saturday, March 19th, 1904, 9 a. m.

L. 5782.

21/300.

WM. W. BIERCE, LTD.,

vs.

CLINTON J. HUTCHINS, Trustee.

Clerk's Minutes.

Hearing on Pl'ff's Bill of Costs, Findings and Fact, and Conclusions of Law.

Present: Kinney, McClanahan & Cooper for Pl'ff. Cathcart & Milverton for Def't. J. L. Horner, Stenographer.

Mr. McClanahan asks the Court to take up the Findings of Facts first after which he reads the Pl'ff's Findings of Facts also the Pl'ff's Conclusions of Law.

[* Words and figures enclosed in brackets erased in copy.]

Mr. Milverton reads Def't's Objections to Pl'ff's proposed Findings of Facts taking *it* one at a time.

The Court overrules objections 1 & 2 to which ruling Mr. Milverton notes an exception.

The Court, after hearing arguments as to objection #3, overrules the objection & exception noted by Mr. Milverton.

To objection # 4, same ruling & exception

" " # 5, " " "

" " # 6, " " "

" " # 7, " " "

" " # 8, " " "

" " # 9, " " "

" " #10, " " "

" " #11, " " "

" " #12, " " "

" " #13, after argument of Counsel, Mr. McClanahan asks leave to amend the Complaint by substituting \$22000 in place of \$20,000 wherever it appears: the Court allows the Amendment & directs the Clerk amend the Complaint.

Mr. Milverton notes an exception.

433 The Court overrules objection #13 & exception noted by

Mr. Milverton.

To objection #14 same ruling & exception.

" " #15 Mr. McClanahan asks leave to strike out the following words in the Pl'ff's Findings of Facts, towit: "save as hereinabove qualified."

The Court grants the Motion.

Mr. Milverton notes an exception.

The Court overrules the Def't's Objection #15, to which Mr. Milverton notes an exception.

Mr. Milverton reads Def't's Objections to Pl'ff's proposed Conclusions of Law taking *it* one at a time.

Objection #1 overruled by the Court & Exception.

" #2 " " "

" #3 " " "

" #4 " " "

" #5 " " "

" #6 " " "

" #7 " " "

" #8 " " "

Mr. McClanahan thereupon asks the Court to allow the Conclusions of Law and the Findings of Fact as presented by endorsement thereon, which is so allowed by the Court.

Mr. Milverton notes an exception.

Mr. McClanahan then presents to the Court the Decision for signature.

Mr. Milverton objects & argues.

The Court overrules the objection & then signs the Decision & filed.

434 Mr. Milverton notes an exception.

Mr. McClanahan reads Pl'ff's Bill of Costs, and Affid't of Wm. W. Bierce.

Mr. Milverton reads Def't's Objections to Pl'ff's Bill of Costs & Affid'ts of Wm. E. Rowell & of C. H. Klugel.

Mr. Milverton takes up the 1st objection argument on Motion to set \$3.00.

The Court after hearing arguments of Counsel, disallows s'd item of \$3.00.

Mr. McClanahan notes an exception.

Second objection, attendance at taking of Deposition of Alex. Lindsey, Jr., \$3.00.

The Court after hearing arguments by Counsel, disallows s'd item of \$3.00.

Mr. McClanahan notes an exception.

Third objection, expense of replevin bond \$300.

The Ct. after hearing arguments by counsel, disallows s'd item of \$300.

Mr. McClanahan notes an exception.

Fourth objection, W. W. Bierce expert testimony; Railway fare W. W. Bierce Chicago to S. F. & return \$110; Sleeper Chicago to S. F. \$15.00; Meals on Sleeper \$10; Steamer fare S. F. to Honolulu & return \$135.00. Transportation & expenses Honolulu to Kailua \$48, making a total of \$318.

The Court after hearing arguments by respective counsel disallows s'd items am't'g to \$318.

Mr. McClanahan notes an exception.

The Court then allows & taxes the Pl'ff's Bill of Costs at \$50.50.

Mr. McClanahan presents to the Court, the Judgment for entry & signature.

435 Mr. Milverton objects to the entering of the Judgment on the grounds taken down by the Stenographer.

The Court overrules the objections.

Mr. Milverton notes an exception.

The Court signs the Judgment.

Mr. Milverton excepts to the Judgment as being contrary to law & the evidence & against the weight of evidence.

Mr. Cathcart gives notice of motion for New Trial.

At 11:15 a. m. the Court adjourns until 9 a. m. on Monday.

(Signed)

P. D. KELLETT, JR., *Clerk.*

436

FRIDAY, April 8th, 1904, A. M.

Before De Bolt, J.

Hearing on Motion for Execution to Issue.

Present: Kinney, McClanahan & Cooper and S. H. Derby for Pl'ff. Cathcart & Milverton for Def't. J. L. Horner, Stenographer.

Mr. McClanahan presents the Motion.

Mr. Milverton objects to the Motion being taken up at this time

reading Rule VI of the First Circuit Court & asks that the Motion should go over until Monday morning.

Mr. McClanahan argues.

Mr. Cathcart argues.

Mr. McClanahan replies.

The Court holds that the consideration of the Motion is proper at this time & therefore overrules the objection.

Mr. Cathcart notes an exception.

Mr. McClanahan reads the Motion & Affidavits of P. D. Kellett, Jr. & of E. B. McClanahan.

Mr. Cathcart reads Counter-Affid'ts of C. J. Hutchins & of Guy F. Maydwell.

Mr. McClanahan argues.

Mr. Cathcart argues.

Mr. McClanahan replies.

Mr. Cathcart replies.

The Court grants the Motion & orders that execution issue on s-d judgment unless the Def't herein deposit with the Clerk of this Court on or before the hour of 9 o'clock a. m. of Friday, April 15th

1904, a bond in not less than double the amount of said judgment with sureties to be approved by this Court, conditioned for the prosecution of the exceptions had herein without delay, & for the performance & payment of the Judgment or part thereof which may be rendered on s-d exceptions by the Supreme Court.

Mr. Cathcart notes an exception.

Mr. Cathcart orally moves the Court for further time to & including April 16th, 1904, within which to prepare, present for allowance & file Bill of Exceptions.

Mr. McClanahan objects to the Motion.

The Court grants the Motion & then signs an order allowing Def't till April 16, 1904, within which to file Bill of Exceptions.

(Signed)

P. D. KELLETT, JR., Clerk.

438 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff-Appellee,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant-Appellant.

Exceptions from Circuit Court, First Circuit.

Notice of Decision on Exceptions.

To the Honorable J. T. De Bolt, First Judge, Circuit Court, First Circuit:

You are hereby notified that in the above entitled cause the Supreme Court has made the following decisions.

"Decision on Exceptions.

"In the above entitled cause, the defendant's exceptions are over-ruled, pursuant to the opinion of said Court filed herein December 20, 1907."

By the Court:

[SEAL.]

(Signed)

J. A. THOMPSON,
Clerk Supreme Court.

Honolulu, March [February]* 4th, 1908.

Endorsed: Supreme Court Territory of Hawaii, October Term, 1907. William W. Bierce, Limited, Appellee, v. Clinton J. Hutchins, Trustee, Appellant. Notice of Decision on Exceptions. Filed March 4, 1908, at 11.10 o'clock A. M. J. A. Thompson, Clerk.

The foregoing is a full true and correct copy of the Original.

[SEAL.]

(Signed)

J. A. THOMPSON,
Clerk Supreme Court.

March 4, 1908.

Endorsed: Law 5782. Circuit Court, First Circuit, Territory of Hawaii. William W. Bierce, Ltd. vs. Clinton J. Hutchins Trustee. Certified Copy of Notice of Decision from the Supreme Court. Filed March 4, 1908 at 11.10 o'clock A. M. J. A. Thompson, Clerk.

439

Publisher's Affidavit.

TERRITORY OF HAWAII,

Island of Oahu, ss:

Before me, the undersigned, a Notary Public, this day personally came C. G. Bockus, who being first duly sworn, according to law, says that he is the Business manager of the Evening Bulletin, a Newspaper published at Honolulu, Territory of Hawaii, daily, except Sundays, and that the Publication, of which the annexed is a true copy, was published in said paper on the 5th, 12th, 19th, 26th day- of April & 3rd day of May, A. D. 1904, in consecutive order, and that the rate charged therefor is not in excess of the commercial rates charged private individuals, with the usual discounts.

(Signed)

C. G. BOCKUS,
Business Manager, Evening Bulletin.

Subscribed and sworn to before me this 2nd day of May, A. D. 1908.

[SEAL.]

(Signed)

P. L. PETERS,
*Notary Public, in and for the First Judicial
Circuit, Oahu, Territory of Hawaii.*

Notice to Creditors.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Notice is hereby given by the undersigned William Waterhouse and Albert Waterhouse, Executors of the Last Will and Testament of Henry Waterhouse, deceased, to the creditors of and all persons having claims against the said deceased to present their claims, duly authenticated, with the proper vouchers, within six months after the first publication of this notice to said executors at the office of Waterhouse & Waterhouse, 932 Fort Street, Honolulu, Territory of Hawaii, same being the place for the transaction of business of said estate in said Territory.

WILLIAM WATERHOUSE,
ALBERT WATERHOUSE,
*Executors of the Last Will and Testament
of Henry Waterhouse, Deceased.*

Dated at Honolulu, T. H., April 5, 1904.

SMITH & LEWIS,
Attorneys for Executors.

2732—Apr. 5, 12, 19, 26; May 3.

Indorsement. P. 3669. Circuit Court First Circuit Territory of Hawaii. In Probate. In the Matter of the Estate of Henry Waterhouse, Deceased. Affidavit of Publication of Notice to Creditors. Filed May 2d 1908, at 10.30 o'clock A. M. J. A. Thompson, Clerk. BB.

440 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii.

At Chambers. In Equity.

R. W. McCHESNEY, J. M. McCHESNEY & F. W. McCHESNEY, Carrying on Business under the Name of M. W. McChesney & Sons, Plaintiffs,

vs.

THE KONA SUGAR COMPANY, LIMITED, a Corporation, and the THE First American Savings and Trust Company of Hawaii, Limited, a Corporation, Defendants; William W. Bierce, Limited, et al., Interveners.

Depositions of Columbus Bierce and Harry T. Gilbert.

441 The depositions of Columbus Bierce, of the City of Chicago, in the County of Cook and State of Illinois, and Harry T. Gilbert, of the City of New Orleans, in the Parish of Orleans, and State

of Louisiana, witnesses of lawful age, produced, sworn and examined upon their respective corporeal oaths, on the 26th day of September, A. D. 1903, at Room 1412 Monadnock Block, in the City of Chicago, in the County of Cook and State of Illinois, by me, Ralph C. Shaw, a commissioner duly appointed by a *dedimus potestatem* or commission issued out of the clerk's office of the Supreme Court of the Territory of Hawaii, bearing teste in the name of the Hon. W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit, in the Territory of Hawaii, with the seal of said court affixed thereto, and to me directed as such commissioner for the examination of the said Columbus Bierce and Harry T. Gilbert, as witnesses in a certain suit and matter in controversy, now pending and undetermined in the said Circuit Court, wherein R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on business under the name of M. W. McChesney & Sons, are plaintiffs, and Kona Sugar Company, Limited, et al. are defendants, and Kapiolani Estate Limited, et al., are intervenors, upon the written interrogatories of William W. Bierce, Limited, which were attached to, or enclosed with, the said commission, as well as upon the cross-interrogatories, if any, of M. W. McChesney & Sons, The Kona Sugar Company, Limited, The First American Savings & Trust Company of Hawaii, The Kapiolani Estate, Limited, L. M. Whitehouse, James A. Hopper Company, Limited, John D. Paris, Hannah Paris, Eliza Roy, W. H. Shipman, J. D. Johnson and W. H. Johnson, and upon the re-direct interrogatories, if any, of the said William W. Bierce, Limited, and upon none others. The said Columbus Bierce and Harry T. Gilbert, being first duly severally sworn by me as such commissioner as witnesses in the said

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442 cause previous to the commencement of their examination to testify the truth as well on the part of the plaintiffs and the defendants as the intervenors, in relation to the matters in controversy between the said intervenor, William W. Bierce, Limited, and the said plaintiffs, defendants and other intervenors, so far as they, the said witnesses, should be interrogated, testified and deposed as follows:

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443 Interrogatories of William W. Bierce Limited propounded to the said COLUMBUS BIERCE, a witness produced and sworn as aforesaid on the part of the said William W. Bierce Limited, and his answers thereto as follows:

Interrogatory 1st. What is your name?

Answer to Interrogatory 1st. My name is Columbus Bierce.

Interrogatory 2nd. What office, if any do you hold in the corporation William W. Bierce, Limited?

Answer to Interrogatory 2nd. I hold the office of Vice President in the corporation William W. Bierce Limited.

Interrogatory 3. If your answer to the last preceding interroga-

tory is that you hold the office of Vice President, state how long you have held that office.

Answer to Interrogatory 3rd. I have held the office of Vice President of William W. Bierce Limited continuously from December 23rd, 1899, until the present time and am still Vice President of the Company.

Interrogatory 4th. State if you know whether William W. Bierce Limited ever had any dealings with the Kona Sugar Company Limited, a corporation, of Hawaii, relative to certain rails, engines, cars and other railroad equipment.

Answer to Interrogatory 4th. Yes, William W. Bierce Limited have had dealings with the Kona Sugar Company, Limited, a corporation, of Hawaii, relative to certain rails, engines, cars and other railroad equipment.

Interrogatory 5th. If your answer to the last preceding interrogatory is in the affirmative, state if you know when and how these negotiations began and what was done thereunder.

Answer to Interrogatory 5th. Either in December of 1899 or in January, 1900, we sent our representative, Mr. Frank Davies, to the Hawaiian Islands, for the purpose of soliciting business and making contracts in behalf of William W. Bierce Limited. While he was there, he entered into negotiations with the officers and representatives of the Kona Sugar Company Limited, a corporation of

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444 Hawaii, for the sale and delivery to the Kona Sugar Company Limited by William W. Bierce Limited of certain rails, engines, cars and other railroad equipment for the plantation railroad of the Kona Sugar Company Limited, and in behalf of William W. Bierce Limited entered into a written contract bearing date February 21st, 1900, with the Kona Sugar Company, Limited, for the sale and delivery to the latter of certain rails, engines, cars and other railroad equipment, which, together with the contract in question, are more particularly described and set forth in my answers to the 13th, 14th and 15th interrogatories of this my deposition.

Interrogatory 6th. If in answer to the last preceding interrogatory you have stated, among other things, that one Frank Davies was sent to Honolulu to act as the representative of William W. Bierce Limited, in regard to these negotiations, state whether the authority of the said Frank Davies was written or oral.

Answer to Interrogatory 6th. The authority of Mr. Frank Davies was both written and oral.

Interrogatory 7th. If in answer to the last preceding interrogatory you have stated that his authority was written, please state if the said power given to him is in existence.

Answer to Interrogatory 7th. I can not state whether the original written authority or power to act for William W. Bierce Limited, given to Mr. Frank Davies, is at present in existence or not. I do not remember ever having seen it since it was given to him. We have made diligent search and inquiry among our files and papers

and diligent inquiry of Mr. Davies for the purpose of finding and producing the original instrument, but neither we nor Mr. Davies has been able to find it, and it is either lost or destroyed.

Interrogatory 8th. If your answer to the last preceding in-

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445 terrogatory is in the affirmative, please produce, identify and attach the said power to your answer as an exhibit thereto.

Answer to Interrogatory 8th. As stated in my answer to the last preceding interrogatory, and for the reasons therein stated, I can not produce or attach to my deposition the original power.

Interrogatory 9th. If your answer to Interrogatory 7th is in the negative, please state whether you have a copy of said written power.

Answer to Interrogatory 9th. Yes, we have a correct and true copy of the written power in question given to Mr. Davies.

Interrogatory 10th. If your answer to the last preceding interrogatory is in the affirmative, please produce, identify and attach said copy to your answer as an exhibit.

Answer to Interrogatory 10th. I herewith produce a copy of the power granted to Mr. Frank Davies and identify it by marking it Exhibit "Z," and hereby attach it to my answer as Exhibit "Z."

Interrogatory 11th. If your answer to question 9th is in the negative, state if you know the contents of said written authority.

To said Interrogatory 11th no answer was given.

Interrogatory 12th. If your answer to question 6th is that the authority given to the said Frank Davies was oral, please state what that authority covered.

Answer to Interrogatory 12th. In a conversation between my brother, William W. Bierce, President of the Company, Mr. Frank Davies and myself, on the eve of Mr. Davies' departure for Honolulu, we said to Mr. Davies that it was our strong desire to have him visit the Islands with a view to getting as much business as it was possible for him to secure; that we were highly desirous of getting all the business that was being offered at that time in the Islands; that our facilities were excellent for furnishing rails, cane cars and rail-

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446 road equipment and that we thought our prices would be sufficiently low to enable him to make large and favorable contracts. With this end in view we told him to visit all the sugar plantations and the various people who might be in the market for the class and character of goods that we were handling, with all of which Mr. Davies was previously familiar, and we told him fully upon what price and upon what terms we would make sales of these goods in the Islands, and told him to proceed thither at once, which he did. In fact the oral authority which we gave to Mr. Davies in that conversation, and possibly in previous conversations on the same subject, was a great deal broader and more comprehensive than the written authority which we gave to him at the time, and a

copy of which I have attached to my deposition as Exhibit "Z," and included all the authority conferred upon him by that written instrument.

Interrogatory 13th. Do you know the handwriting of the Frank Davies referred to in the preceding questions and answers?

Answer to Interrogatory 13th. Yes, I do know the handwriting of Frank Davies referred to in the preceding interrogatories and my answers thereto, from having frequently seen him write and sign his name.

Interrogatory 14th. If your answer to the last preceding interrogatory is in the affirmative, please examine the letter dated Honolulu February 21st, 1900, addressed to the Kona Sugar Company Limited, which is attached to these interrogatories and made a part hereof, and marked "Exhibit A" and state if you know whose signature are the words "Frank Davies," appearing twice on page 4 of said letter, being in each case immediately preceded by the words "William W. Bierce Limited by."

Answer to Interrogatory 14th. I have examined the letter dated Honolulu, February 21st, 1900, addressed to the Kona Sugar Company, Limited, which is attached to these interrogatories and

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447 made a part thereof and marked Exhibit A," and have particularly examined the signatures thereto and know that the words "Frank Davies" appearing twice on page 4 of said letter, being in each case immediately preceded by the words "William W. Bierce Limited by" are the genuine signature of the Frank Davies referred to in the preceding interrogatories and my answers thereto.

Interrogatory 15th. If your answer to the last interrogatory is to the effect that the said words "Frank Davies" are the signature of the said Frank Davies hereinabove referred to, state in detail what was done after February 21st, 1900, by William W. Bierce, Limited, in regard to the railroad equipment mentioned in the said letter.

Answer to Interrogatory 15th. After February 21st, 1900, on Mr. Davies' return to our New Orleans office, he made a full and favorable report to us of the negotiations had by him in the Islands with the Kona Sugar Company, Limited, and of the sale made in question to the latter. and delivered over to us the original letter bearing, the same as it does now, the acceptance of the Kona Sugar Company, Limited, by M. W. McChesney & Sons, Agents, dated February 22nd, 1900, and William W. Bierce, Limited, thereupon proceeded at once to purchase and have manufactured and to assemble for shipment all of the various items of railroad rails, engines, cane cars and other railroad equipment mentioned and described in said letter of February 21st, 1900, and the acceptance thereof, and proceeded to ship and did ship to the Kona Sugar Company, Limited, Honolulu, Hawaiian Islands, the major portion of said railroad rails and both the engines and all the cars and other railroad equipment therein mentioned. The only portion of the goods in question not

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448 so shipped consisted of about 188 tons of railroad rails, of the value of about \$9,532, at the prices specified in the agreement of sale in question, which was not shipped on account of the failure of the Kona Sugar Company, Limited, to pay its promissory note at maturity, which note I will refer to later. I was actively in charge of the New Orleans office of William W. Bierce, Limited, as Vice President of the Company, during the entire period covering all the transactions mentioned in my answer to the interrogatories contained in this my deposition, both preceding and following this answer, and fully remember the entire transaction in question between William W. Bierce, Limited, and the Kona Sugar Company, Limited. According to the terms of the contract we made shipments, making sight draft upon the Kona Sugar Company, Limited, together with bills of lading attached thereto, and upon their failure to pay the drafts promptly at maturity we then sent our Mr. Harry T. Gilbert to San Francisco to confer with Mr. McChesney, the President of the Kona Sugar Company, Limited. Upon failure on the part of the Kona Sugar Company, Limited, to pay the drafts, we ordered Mr. Gilbert to proceed to Honolulu, which he did, and after confer-ing with the Kona Sugar Company Limited there he succeeded in getting a cash payment of \$10,000 and a note for the balance. After Mr. Harry T. Gilbert returned, bringing with him the note and conditional sale agreement of March 13th, 1901, we deposited the note in the regular course of business with our bank for collection, and upon its maturity the note was promptly presented for payment, and the same not having been paid was protested for non-payment, whereupon we again sent our Mr. Gilbert to San Francisco and Honolulu for the purpose of collecting this money, and failing in his endeavor the matter was placed by Mr. Harry T. Gilbert in the hands of our attorneys, Messrs. Kinney, Ballou & McClanahan.

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449 Interrogatory 16th. If, in answer to the last preceding interrogatory you have mentioned Harry T. Gilbert as acting for William W. Bierce, Limited, in connection with this matter, state whether the authority of the said Harry T. Gilbert to act for William W. Bierce Limited was written or oral.

Answer to Interrogatory 16th. Having mentioned the name of Harry T. Gilbert as acting for William W. Bierce Limited, in connection with this matter, I desire to state that the authority given to Harry T. Gilbert was both written and oral.

Interrogatory 17th. If, in your answer to the last preceding interrogatory, you have stated that the authority of the said Harry T. Gilbert was in writing, state if the said authority in writing is in existence.

Answer to Interrogatory 17th. Yes. Said original written authority is now in existence.

Interrogatory 18th. If your answer to the last preceding interrogatory is in the affirmative, please produce said written authority, identify it and attach it to your answer as an exhibit.

Ans. to Interrogatory 18th. I herewith produce said original written authority to Mr. Harry T. Gilbert and attach same to this my answer, marked and identified as "Exhibit Y."

Interrogatory 19th. If your answer to Interrogatory 17th is in the negative, please state whether you have a copy of said written authority.

No answer.

Interrogatory 20th. If your answer to the last preceding interrogatory is in the affirmative, please produce the said copy, identify it

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450 and attach it to your answer as an exhibit.

No answer.

Interrogatory 21st. If your answer to Interrogatory 19th is in the negative, state if you know what the contents of said written authority were.

No answer.

Interrogatory 22nd. If your answer to interrogatory 16th is to the effect that the authority given to the said Harry T. Gilbert was oral, please state what that authority was.

Answer to Interrogatory 22nd. The oral authority given to Harry T. Gilbert by the President and Vice President of William W. Bierce Limited was in substance to proceed to San Francisco and Honolulu, with a view to effecting a settlement with the Kona Sugar Company Limited. We told him to take any and all such steps as in his discretion he might deem necessary or proper, for the purpose of collecting the money due us on the promissory note in question, and to make any disposition of the note and collateral which he might deem proper for that purpose. The scope of the authority so given to him verbally was as comprehensive as possible, and included all the authority conferred upon him by the written power attached to my deposition as "Exhibit Y," which was given to him as evidence of his authority to present to any persons with whom he might find it necessary to deal, in making such settlement and in collecting our money or negotiating the note and collateral for that purpose.

Interrogatory 23rd. Do you know the handwriting of the said

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451 Harry T. Gilbert.

Answer to Interrogatory 23rd. Yes. I do know the handwriting of Harry T. Gilbert, from having frequently seen him write and sign his name.

Interrogatory 24th. If your answer to the last preceding interrogatory is in the affirmative, please examine the letter dated Honolulu, March 13th, 1901, addressed to the Kona Sugar Company Limited, Honolulu, H. I., which is attached to these interrogatories as "Exhibit B," and hereby made a part of them, and state if you know whose signature are the words "Harry T. Gilbert," appearing twice on the second page of the said Exhibit B, being in each case immediately preceded by the words "W. W. Bierce Limited by."

Ans. to Interrogatory 24th. I have examined the letter dated Honolulu, March 13th, 1901, addressed to the Kona Sugar Company Limited, Honolulu, H. I., which is attached to these interrogatories as "Exhibit B," and know that the words "Harry T. Gilbert" appearing twice on the second page of said "Exhibit B," being in each case immediately preceded by the words "W. W. Bierce Limited by" are the genuine signature of the Harry T. Gilbert referred to in the preceding interrogatories and answers.

Interrogatory 25th. State if you know what, if anything, was done by William W. Bierce Limited, in regard to the said rails, locomotives, cars, scales and other materials referred to in said letter of March 13th, 1901, after the execution by them of the said letter referred to in the immediately preceding questions.

Answer to Interrogatory 25th. After the execution of said letter above referred to, the rails, locomotives, cars, scales and other materials referred to in said letter of March 13th, 1901, were turned

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452 over and delivered to the Kona Sugar Company Limited, by William W. Bierce Limited, to be held by them as the property of William W. Bierce Limited, until the full payment of the note in question. Payment having been refused upon the note, we subsequently sent Mr. Gilbert to San Francisco and Honolulu for the purpose of collecting the money or recovering back the property which we had turned over to the Kona Sugar Company Limited, under the agreement of March 13th. Failing in both, Mr. Gilbert placed the matter in the hands of our attorneys, Messrs. Kinney, Ballou & McClanahan, together with the note and bonds, for the purpose of collecting the money or recovering back the goods, neither of which has been done as yet. No payment has ever been made to William W. Bierce Limited on the note in question, which is still held by William W. Bierce Limited, together with the bonds received as collateral thereto. All efforts to collect anything on this note having failed and the collateral having apparently become worthless, William W. Bierce, Limited, about January 1st, 1903, instructed its attorneys, Messrs. Kinney, Ballou & McClanahan, to proceed by all lawful means to recover back for William W. Bierce Limited the possession of the goods in question, conditionally delivered to the Kona Sugar Company Limited as the property of William W. Bierce Limited.

Interrogatory 26th. State if you know what, if anything, was done by the said Kona Sugar Company Limited, in regard to the said materials, after the said offer of March 13th, 1901.

Answer to Interrogatory 26th. The Kona Sugar Company Limited, after the offer and acceptance of the offer dated Honolulu, H. I., March 13th, 1901, took over the property and used the same holding it as the property of William W. Bierce Limited, until fully

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453 paid for.

Interrogatory 27th. If, in answer to the two last preceding

interrogatories, you have mentioned any correspondence between the Kona Sugar Company Limited and William W. Bierce Limited, relative to the subject matter of the last preceding interrogatory, please produce the same, identify it and attach them to your answer as exhibits.

No answer.

Interrogatory 28th. State if you know whether or not William W. Bierce Limited ever received a note for \$37,044.53, purporting to be the note mentioned in the said letter of March 13th, 1901, referred to in interrogatories 23, 24, 25, and 26?

Answer to Interrogatory 28th. Yes. William W. Bierce Limited did receive a note for \$37,044.53, purporting to be the note mentioned in the said letter of March 13th, 1901, referred to in interrogatories Nos. 23, 24, 25 and 26.

Interrogatory 29th. If your answer to the last preceding interrogatory is in the affirmative, state whether or not you have the said note in your possession at the present time.

Answer to Interrogatory 29th. The said note above referred to is still in the possession of William W. Bierce Limited.

Interrogatory 30th. If your answer to the interrogatory is in the affirmative, please produce the same, identify it and attach it to your answer as an exhibit.

Answer to Interrogatory 30th. I hereby produce the said note above referred to, identify it by marking it "Exhibit W," and attach it to this my answer as "Exhibit W."

Interrogatory 31st. Do you know the signature of Wm. W. Bierce?

(Sig.) RALPH C. SHAW, *Com'r.*

454 Answer to Interrogatory 31st. Yes. I do know the signature of Wm. W. Bierce from having frequently seen him write and sign his name.

Interrogatory 32nd. If your answer to the last preceding interrogatory is in the affirmative, please examine the endorsement on the back of said note, produced, identified and attached by you as an exhibit as aforesaid, and state if you know whose signature are the words "Wm. W. Bierce Predt." written under the words "Wm. W. Bierce Limited."

Answer to Interrogatory 32nd. I have examined the endorsements on the back of the note produced, identified and attached by me as "Exhibit W" as aforesaid, and know that the words "Wm. W. Bierce Predt." written under the words "Wm. W. Bierce Limited by" is the genuine signature of Wm. W. Bierce, President of William W. Bierce Limited.

Interrogatory 33rd. Do you know the signature of W. W. Bouden?

Answer to Interrogatory 33rd. Yes, I do know the signature of W. W. Bouden, from having frequently seen him sign and write his name.

Interrogatory 34th. If your answer to the last preceding interrogatory is in the affirmative, examine the endorsements on the

back of the note already referred to and state if you can whose signature are the words "W. W. Bouden, Sec't'y & Treas." appearing twice on the back of said note.

Answer to Interrogatory 34th. I have examined the endorsements on the back of the note already referred to and know that the words "W. W. Bouden, Sec't'y & Treas.," appearing twice on the back of said note are the genuine signature of W. W. Bouden,

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455 Secretary and Treasurer of William W. Bierce Limited.

Interrogatory 35th. State if you know whose signature are the words "C. Bierce, V. Pres't" appearing on the back of said note immediately under the words "Wm. W. Bierce Ltd."

Answer to Interrogatory 35th. I have examined the words "C" Bierce, V. Pres't," appearing on the back of said note above referred to, immediately under the words "Wm. W. Bierce Ltd. by," and the same are my genuine signature as Vice President of William W. Bierce Limited.

Interrogatory 36th. If your answer to Interrogatory 23rd is in the affirmative, please examine the endorsements on the back of said note referred to, and state if you can whose signature are the words "Harry T. Gilbert," appearing thereon.

Answer to Interrogatory 36th. The words "Harry T. Gilbert" appearing on the back of the note already referred to, are the genuine signature of the said Harry T. Gilbert referred to in the preceding interrogatories and my answers thereto.

Interrogatory 37th. If your answer to Interrogatory 28th is in the affirmative, state whether the said note referred to in said interrogatory and answer thereto was paid when due.

Answer to Interrogatory 37th. The said note above referred to was not paid when due.

Interrogatory 38th. If your answer to Interrogatory 28th is in the affirmative and your answer to Interrogatory 37th is in the negative, state what payments, if any, have at any time been made

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456 on said note.

Answer to Interrogatory 38th. No payment whatsoever has been made, at any time, upon said note.

Interrogatory 39th. If your answer to Interrogatories 37th and 38th are substantially to the effect that the said note was not paid when due, and that no payments have, at any time, been made on said note by any person, state what, if anything, was done by William W. Bierce Limited, after the non-payment of the said note when due.

Answer to Interrogatory 39th. After the said note matured and was not paid upon presentation, William W. Bierce Limited immediately caused the same to be promptly protested for non-payment, and as stated in my answer to preceding interrogatories of this my deposition, sent the said Harry T. Gilbert to Honolulu as

its representative, for the purpose of making a settlement with the Kona Sugar Company Limited, by negotiating the note or collateral or otherwise collecting the money due on the note. Mr. Gilbert having failed to make such settlement or to collect anything on the note, turned over the note and collateral agreements referred to in my testimony to Messrs. Kinney, Ballou & McClanahan, our attorneys at Honolulu, for collection of the money due us, or the recovery back of the specific property or goods in question delivered by us to the Kona Sugar Company Limited, by enforcing any and all legal remedies against the latter for this purpose, to which we were entitled under our agreement with them. Whenever I speak of "we" "our" or "us" in my deposition, I mean William W. Bierce Limited. Before any proceedings had been taken in our behalf, by Messrs. Kinney, Ballou & McClanahan, against the Kona Sugar

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457 Company Limited, we were advised by them that a suit had been brought by M. W. McChesney and other stockholders against the Kona Sugar Company Limited and others, and a receiver appointed therein, for the property of the Kona Sugar Company Limited, which proceeding had operated to forestall substantially any action we could take for the collection of our money or the recovery back of our property otherwise than by intervening in said receivership suit, which I understand to be the same suit in which this my deposition is being taken. In the middle or latter part of the year 1902, we were informed by our attorneys in Honolulu, Messrs. Kinney, Ballou & McClanahan, that they, acting as our attorneys, had given notice of a claim of mechanic's lien against the railroad in question, the plantation railroad of the Kona Sugar Company Limited, and had subsequently instituted an action for enforcement of said lien against the railroad, engines, cars and other railroad equipment referred to in the preceding interrogatories and my answers thereto, which were then in the possession of the Kona Sugar Company Limited. In our correspondence with and instructions to Messrs. Kinney, Ballou & McClanahan, we left the matter wholly in their discretion, believing that they who were near the scene of action were better advised of all the conditions and circumstances affecting the property and our rights than we could possibly be at this great distance, to take such proceedings in our behalf for the recovery of our money or our property from the Kona Sugar Company Limited, as they might deem advisable under all the circumstances.

Interrogatory 40th. If in answer to the last preceding interrogatory you have stated, among other things, that during the

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458 middle and latter part of the year 1902 you were informed by your attorneys in Honolulu, Messrs. Kinney, Ballou & McClanahan, that they, acting as your attorneys, had given notice of a claim of lien, and had subsequently instituted an action on said

lien against the rails, engines, cars and other railroad equipment referred to in the preceding interrogatories, which were at that time in the possession of the Kona Sugar Company Limited, state what information or belief, if any, William W. Bierce, Limited, had, at the time they were notified that a lien had been filed in regard to the rights of the Kona Sugar Company Limited, in and to the land over which the plantation railroad ran.

Answer to Interrogatory 40th. At the time William W. Bierce Limited were informed by Messrs. Kinney, Ballou & McClanahan that they had filed a mechanic's lien claim in our behalf, as stated in my answer to the last preceding interrogatory, we had considerable information which seemed to point conclusively to the fact that the Kona Sugar Company Limited owned the land on which the rails, cars, locomotives, scales and other material supplied by us, as stated in my answer to the foregoing interrogatory, had been installed and used in operating the plantation railroad of the Kona Sugar Company Limited. This information consisted of statements made to us verbally by Mr. Frank Davies and by Mr. Harry T. Gilbert, after they had visited the Islands as our representatives, to the effect that the goods in question were to be used in building, constructing and operating the railroad of the Kona Sugar Company Limited, on the Kona plantation of the Company, and later that the same had been so used and that the Kona Sugar Company Limited was operating this railroad on and as an essential part of a large sugar plantation located in Kona district, in the island of Hawaii, of which plantation it was the owner. We received like information from time to

RALPH C. SHAW, *Com'r.*

459 time from Messrs. Kinney, Ballou & McClanahan, and under all the circumstances it was a reasonable and necessary inference on our part that the Kona Sugar Company Limited, either held the title in fee simple to the land on which the plantation railroad was constructed or held a long term written lease thereof, or had otherwise acquired a satisfactory title to the land in the shape of a written conveyance of right of way or equivalent rights and title by condemnation proceedings, which is a usual and familiar mode of acquiring title to land for use as a railroad right of way in all parts of the United States.

Interrogatory 41st. State what information or belief, if any, William W. Bierce Limited had at the time they were notified that an action had been begun on said lien against the railroad equipment, etc. referred to in the last preceding interrogatory.

Answer to Interrogatory 41st. At the time William W. Bierce Limited were informed that an action had been begun to enforce such mechanic's lien, in its behalf, against the railroad and railroad equipment referred to in the last preceding interrogatory and my answer thereto, they had the same information and belief as mentioned in my answer to the last preceding interrogatory.

Interrogatory 42nd. If in answer to the two last preceding interrogatories you have stated that at the times therein referred to Wil-

liam W. Bierce understood and believed that the plantation railroad of the Kona Sugar Company Limited, which railroad was made up by the rails, engines, cars, etc., referred to in these interrogatories, ran over lands belonging to the Kona Sugar Company, Limited, state what, if any, understanding or belief William W. Bierce

(Sig.) RALPH C. SHAW, *Com'r.*

460 has upon that subject at the present time.

Answer to Interrogatory 42nd. Our understanding and belief that the plantation railroad in question of the Kona Sugar Company Limited was constructed upon land the title to which was held by the Kona Sugar Company Limited, existed until about the first of January, 1903, when our Chicago counsel, Mr. H. W. Prouty, upon his return from his trip to Honolulu, in connection with this case, told us that he had learned, while in Honolulu, that the Kona Sugar Company Limited held no title whatsoever and never had held title, in any form, to the land on which this plantation railroad was constructed, and over which it ran, and according, to the best information we have been able to obtain, appeared to have been and still to be a trespasser thereon, in constructing and operating its railroad on the land, greatly to our astonishment and contrary to all the information we had previously received on the same subject. At about the same time, we were advised to the same effect by letters received in the usual course of mail in our office in Chicago, from our Honolulu counsel, Messrs. Kinney, Ballou & McClanahan. In the wildest flights of our imagination, we had never imagined that anybody other than an idiot or an insane man would attempt to build a railroad without title to or right of way over the land whereon the railroad was to be constructed, and as soon as our previous misinformation on this subject had been corrected by the information first received by us on about the first of January, 1903, from Mr. Prouty and from Messrs. Kinney, McClanahan & Bigelow, in the manner as I have stated, that this identical thing had been done in the case of the plantation railroad in question of the Kona

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461 Sugar Company Limited, viz: the improvident and insane construction and operation of its railroad on land to which it held no title and over which it never had any right of way whatsoever, we promptly instructed our Honolulu attorneys, Messrs. Kinney, McClanahan & Bigelow, to dismiss the suit brought and claim filed by them, for the purpose of enforcing the mechanic's lien on the railroad in question, for the balance of the contract price of the railroad equipment, to which I have previously referred in my testimony.

Interrogatory 43rd. If your answer to the last preceding interrogatory is substantially to the effect that at the present time the understanding and belief of William W. Bierce is that the said railroad runs practically wholly on land on which the Kona Sugar Company

Limited is not now and never was the owner, either in fee simple or by leasehold, but simply at most a bare lessee, state when William W. Bierce Limited has received information to this effect.

Answer to Interrogatory 43rd. As stated in my answer to the last preceding interrogatory, William W. Bierce Limited first received information to the effect that the Kona Sugar Company Limited is not and never was the owner either in fee simple or by leasehold of the land over which the plantation railroad in question runs, and does not now hold and never has held any right of way whatsoever over said land, on or about January 1st, 1903.

(Sig.) RALPH C. SHAW, *Com'r.*

462 Interrogatory 44th. If your answer to the last preceding interrogatory is substantially to the effect that William W. Bierce Limited has received such information about the first of January, A. D. 1903, state what if anything they did upon receiving such information.

Answer to Interrogatory 43rd. As stated in my answer to the 42nd Interrogatory, as soon as William W. Bierce Limited received said information, on or about January 1st, 1903, they instructed their Honolulu attorneys, Messrs. Kinney, McClanahan & Bigelow, promptly to dismiss the suit previously brought by them, for the purpose of establishing a mechanic's or material men's lien upon the plantation railroad in question, for the unpaid balance of the contract price of the railroad equipment in question.

(Signed)

COLUMBUS BIERCE.

Subscribed and sworn to before me this 26th day of September, 1903.

(Signed)

RALPH C. SHAW,
Commissioner.

463

EXHIBIT Z.

NEW ORLEANS, Dec. 23, 1899.

The bearer, Mr. Frank Davies, has been duly appointed manager of the Supply Department of this corporation, and as such is authorized to enter into such contracts in the name of the corporation as in his judgment may inure to its benefit. Contracts so made by him, will be executed and signed "William W. Bierce, Limited, by William W. Bierce, President."

(Sig.) RALPH C. SHAW, *Com'r.*

Pl'ff's Exh. A.

464

EXHIBIT A.

HONOLULU, HAWAIIAN ISLANDS, Feb'y 21st, 1900.

Kona Sugar Company, Hawaiian Islands.

GENTLEMEN: For the sum of Forty six (\$46.40) Dollars and forty cents per ton of 2,240 pounds, we propose to furnish you with five hundred and fifty (550) Tons of first quality Steel "T" Rails, weighing 35 lbs. to the yard. Also, to furnish sufficient complete joints to lay said Rails for the sum total of Two Thousand Two Hundred and eighty One (\$2,281.00) Dollars, one complete joint being furnished for each Rail; a complete joint consisting of two Angle Bars and four bolts. Also, for the sum of One Thousand Four Hundred and Forty (\$1,440.00) Dollars to furnish sufficient $4\frac{1}{2}$ " x $\frac{1}{2}$ " Railroad Track Spikes to lay the 550 Tons of Rails with cross ties 2' between centers.

The above prices are all freight prepaid to Honolulu, the Kona Sugar Company to reimburse Bierce for the insurance to be paid thereon.

We are also to furnish for the sum of Five Hundred and Forty Five (\$545.00) Dollars, c. i. f. prepaid to Honolulu, ten sets of 35 lb. split switch material complete with Plantation Target Stand, No. 6 Frog, 7' 6" Split Switch points, tie rods and slide plates; all designed for 3' gauge of track.

Further to furnish sixteen (16) cars, 28' long, 7' wide, end stakes 5' high above floor line, for 3' gauge of track; as per the following specifications; price to be three hundred and forty (\$340.00) Dollars per car c. i. f. prepaid to Honolulu.

Lumber.

- 6 Longitudinal Sills, 4" x 8" Pine.
- 2 End Sills, 6" x 10" Oak; (planking 2").
- 2 Sub End Sills, $5\frac{1}{2}$ " x 6" Oak.

(Sig.) RALPH C. SHAW, Com'r.

- 465 4 Draft Timbers, $2\frac{1}{2}$ " x $5\frac{1}{2}$ ", Oak.
 2 Cross Ties, 3" x 5" Oak.
 6 End Stakes, 4" x 5" Oak, 5' above floor line of car.
 Filler blocks of oak.

Construction.

Sills will be mortised and tenoned to fit. Draft timbers will be bolted to both center sills, end sills and sub end sills, and be protected by cast iron mortise blocks. Cross ties will support car in center in conjunction with truss rods. End stakes will be mortised into end sills, and braced with angle or T iron for 3' of their length. All wood to be coated with mineral paint; all iron work with asphaltum.

No floor planks, or side stakes shall be furnished.

Trucks.

Two standard Trucks of the diamond type, provided each with four wheels, chilled charcoal iron, 24" in diameter, $3\frac{1}{2}$ " tread, 275 lbs. each, mounted on axles $3\frac{3}{4}$ " diameter; Journals $3\frac{1}{2}$ " diameter and having solid brass journal bearings. The top arch bar shall be 3" x 1" the inverted arch bar 3" x $\frac{3}{4}$ " and the tie bars 3" x $\frac{5}{8}$ ", bent to shape and drilled $\frac{3}{4}$ " column and journal box bolts. Journal boxes of cast iron provided with spring lid and hinged at the top. Bolster springs are to be in nests of four each, provided with plates top and bottom and of such sizes and dimensions to suit capacity of cars. Truck bolsters shall be I Beams and Channels—there shall be no wood work of any kind in the truck proper. Body bolster shall be of steel.

Stake Pockets.

Side stake pockets, 24 in number (12 on each side of the car) of malleable iron for $3\frac{1}{2}$ " x $3\frac{1}{2}$ " stake at top, and diminishing to 3" x 3" at bottom. They shall be fastened to outside sill with $\frac{5}{8}$ " U bolt, said U bolt passing through filler block to intermediate sills and fastened with nut on cast iron washer.

Ends.

The end stakes shall be tenoned into end sills and braced in front with T or angle iron for 3' of the stake, and further braced with

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466 malleable iron bracket at end of car. Shall be bored for $\frac{1}{2}$ " bolts to hold planking in position. Shall be held in position at bottom each by two $\frac{5}{8}$ " eye bolts, passing through bottom of stage and sill and fastened to intermediate sills.

Draw Gear.

Draw gear consists of Cast Iron drawheads, wrought iron follower plates, guides, etc., with draw springs and cast iron draw bar stops. Draw timbers are secured to center sills each with two $\frac{5}{8}$ " bolts provided with cup washers on top and double nuts and wrought iron washers on bottom. Are further secured to buffer blocks (sub end sills) with four $\frac{5}{8}$ " bolts. Drawbar carrier is made of $2\frac{1}{4}$ " x $\frac{3}{8}$ ", with ends gibbed to prevent draw timbers from spreading. Buffer block, or sub end sill is faced with plate of 4" x $\frac{5}{8}$ " iron.

Brake.

Car equipped with hand brake on each Truck each with end wheel working on end sill.

General.

Lumber entering into the manufacture of this car to be of good merchantable quality. Cars are to be shipped knocked down. All work to be done in a thorough and workmanlike manner. Car guaranteed for fifteen (15) tons carrying capacity.

The locomotives to be furnished are as follows:

One 9" x 14", Class "A" Saddle Tank locomotive of the Dickson Locomotive Works make, as per photograph, signed by both parties hereto for identification. Price of this locomotive to be Three Thousand Seven Hundred and Fifty Five (\$3,755.00) Dollars, c. i. f. prepaid to Honolulu. This locomotive to be for 36" gauge, marked "Kona Sugar Company," "No. 1," and to be fitted with steam brake.

(Sig.) RALPH C. SHAW, *Com'r.*

467 Also

One 10" x 16", Class "M," back truck Saddle Tank Locomotive, with six driving wheels, to be manufactured by the Dickson Locomotive Works, for 36" gauge, to be fitted with steam brake and a duplicate in construction of the "Halawa," photo signed by both parties and attached hereto for identification. The approximate weight of this locomotive ready for service will be 38,000 pounds, 31,500 lbs. of which will be carried on the driving wheels. The driving wheels of this locomotive will be 33" diameter, whilst those under the trucks will be 18" diameter. The boiler pressure will be 150 lbs., water capacity 500 gallons, piston rod of machine steel, to have two sand boxes one forward and one back of the driving wheels; to be furnished with bal-oon shaped stack with spiral cone provided with steel wire netting. Cross head pump to be on right side and injector on left side. Fire box of steel. Price of this locomotive to be five Thousand Four Hundred and Ninety Five (\$5,495.00) Dollars c. i. f. prepaid to Honolulu. Locomotive to be marked "Kona Sugar Company" "No. 2."

These locomotives will each have two headlights, be constructed for use of either wood or coal as fuel; sold and guaranteed to be of best material, workmanship and design, and equal in every degree to locomotive of same size and type built and manufactured by the Baldwin Locomotive Works.

Lastly, there is to be furnished one "Howe" Narrow Gauge Track Scale, to have a capacity of 25 Tons, platform 30' in length—foundation plan to be furnished by us—timber, work and foundation to be furnished by the Kona Sugar Company. Price \$500.00 c. i. f. prepaid to Honolulu.

Deliveries.

Shipment of one-third of the Rails, joints therefor, all the spikes, all the switches, four cars, the 9" x 14" Locomotive, and the scales from works in four months after acceptance of this proposition;

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468 another one-third of the rails, together with the joints therefor, in five months after acceptance of this proposition; the balance of the Rails and Joints in six months after acceptance of this proposition; the balance of the cars (12) and the 10" x 16" locomotive may be shipped at any time to insure delivery at Honolulu December 1st to 15th after signing of contract.

Terms of Payment.

Cash upon presentation of demand draft attached to bill of lading, issued by initial line of railroad, showing material to have been shipped through to Honolulu. Insurance policy shall be transmitted as soon as possible after shipment is made, when it shall be determined just what vessel shall haul the material from port on mainland to Honolulu.

All monies are payable in New York or Chicago funds; the Kona Sugar Company to pay all items of exchange.

Twenty five hundred (\$2,500.00) Dollars in paid up stock of the Kona Sugar Company shall be the first payment on account of the purchases herein proposed; this \$2,500.00 to be covered by 5% deductions from the materials as shipped. Bierce agrees to deposit this \$2,500.00 stock of the Kona Sugar Company with the Banking House of Bishop & Company in the City of Honolulu, as guarantee for the final consummation of the contract.

NOTE.—Where reference herein is made to Honolulu as point of delivery—if vessels are available about time material is ready to ship sellers will make delivery at Kailua, District of Kona, in the Hawaiian Islands; but this is not to be construed as in any manner obligatory or binding.

This proposition is a confirmation of the verbal one made to the

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469 Directors of the Kona Sugar Company at their meeting, Saturday, February 17th, 1900, and becomes binding on all parties when accepted by their agents, M. W. McChesney & Sons.

When duly accepted and made binding, said contract is amenable to the laws of the Hawaiian Islands in effect at date of signing.

Yours very truly,

(Signed) WILLIAM W. BIERCE, LTD.,
By FRANK DAVIES.

Accepted in duplicate by
THE KONA SUGAR CO., LTD.,
By M. W. MCCHESNEY & SONS, *Agents.*

This 22nd day of February, 1900.

Truss rods on cars 4 in number, 1" dia. upset ends 1 1/8" Turn-buckets 1".

W. W. BIERCE, LTD.,
By FRANK DAVIES.

(Sig.) RALPH C. SHAW, *Com'r.*

470

EXHIBIT Y.

Know all men by these presents: That, acting under the authority and pursuant to a resolution of the Board of Directors of William W. Bierce, Limited, a corporation organized under the laws of the State of Louisiana and domiciled in the City of New Orleans, a duly certified copy whereof is hereto annexed, I, the undersigned, William W. Bierce, President of the said William W. Bierce, Limited, for and on behalf of the said corporation do hereby constitute and appoint H. T. Gilbert, a resident of the City of New Orleans but temporarily abiding in the City of San Francisco, State of California, a true and lawful agent and attorney in fact of the said William W. Bierce, Limited, for and in the place of the said corporation, to endorse and dispose of upon such terms as to him may seem fit and proper, a certain promissory note made by the Kona Sugar Company, Limited, of Honolulu, through its President, J. M. McChesney, for the sum of Thirty Seven Thousand Forty Four Dollars and Fifty Three Cents (\$37,044.53), dated March 13th, 1901, and payable six months after date of the order of William W. Bierce, Limited, at the Whitney National Bank of New Orleans, Louisiana, the said note being secured by 76 bonds of the said Kona Sugar Company, Limited, of the par value of Five Hundred Dollars (\$500.00) each, numbered from 1 to 76, both inclusive, and the said H. T. Gilbert is further authorized for and on behalf of the said William W. Bierce, Limited, to transfer and dispose of the said bonds pledged as collateral as aforesaid, together with the said note.

In witness whereof, I have hereunto affixed my hand on this fifth day of April, 1901.

(Signed)

WM. W. BIERCE.

(Sig.) RALPH C. SHAW, *Com'r.*

471

Before me, the undersigned authority, personally came and appeared William W. Bierce of the City of New Orleans, to me well known to be the person whose genuine signature is annexed to the foregoing document and to me well known to be the President of the corporation known as William W. Bierce, Limited, of the City of New Orleans, who acknowledged before me, in the presence of E. W. Holden and Chas. Payne Tenner, the undersigned competent witnesses, that he had signed the foregoing document under the authority of and pursuant to the resolution of the Board of Directors of William W. Bierce, Limited, a copy whereof is annexed thereto, and of his own free will and accord for the purposes therein mentioned.

In witness whereof I have hereunto affixed my hand and seal, together with the said William W. Bierce and the said E. W. Holden and Chas. Payne Tenner, competent witnesses as aforesaid, on this fifth day of April, 1901.

(Signed) E. W. HOLDEN.
CHAS. PAYNE TENNER.

WM. W. BIERCE.

J. G. EUSTIS,
Notary Public.

(Sig.) RALPH C. SHAW, *Com'r.*

472 At a special meeting of the Board of Directors of William W. Bierce, Limited, held on the fifth day of April, 1901, at the office of the Company, the following resolution was offered and, upon motion, unanimously adopted.

Be it resolved, That William W. Bierce, the President of this Company, be and he is hereby authorized, for and on behalf of this Company, to execute in favor of H. T. Gilbert, a resident of this city but temporarily abiding in the city of San Francisco, State of California, a power of attorney authorizing the said H. T. Gilbert, for and on behalf of this Company, to endorse in the name of this Company, and to dispose on such terms and conditions as to him may seem fit and proper, a certain promissory note executed by the Kona Sugar Company, Limited, through its President, J. M. McChesney, for Thirty Seven Thousand Forty Four Dollars Fifty Three Cents (\$37,044.53), dated March 13th, 1901, and made payable six months after date to the order of William W. Bierce, Limited, at the Whitney National Bank of New Orleans, Louisiana, the said note being secured by seventy-six (76) mortgage bonds of the said Kona Sugar Company, Limited, of the par value of Five Hundred Dollars (\$500.00) each, the said bonds being numbered from 1 to 76, both inclusive; and the said William W. Bierce, President, is further empowered to authorize the disposition by the said H. T. Gilbert of the said bonds.

I, the undersigned, Secretary of William W. Bierce, Limited, hereby certify that the foregoing is a true extract from the minutes of the said Company.

[SEAL.] (Signed) W. W. BOUDEN, *Secretary.*

(Sig.) RALPH C. SHAW, *Com'r.*

473

EXHIBIT B.

HONOLULU, H. I., Mar. 13, 1901.

Kona Sugar Company, Limited, Honolulu, H. I.

GENTLEMEN: In pursuance of the verbal arrangement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company Limited and William W. Bierce Limited as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company Limited Feb. 22, 1900;

We will take in settlement of this contract the sum of \$10,000, U. S. Gold Coin, and the promissory note of the Kona Sugar Company Limited for the sum of \$37,044.53, in favor of William W. Bierce, Ltd., payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company Limited of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding \$200,000. This offer is conditioned upon its acceptance by you payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us, before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales, and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Very truly yours,

(Signed)

W. W. BIERCE, LTD.,
By H. T. GILBERT.

(Sig.) RALPH C. SHAW, *Com'r.*

474 The above terms are accepted this March 13th, 1901.

THE KONA SUGAR CO., LTD.,

By Its President, J. M. McCHESNEY,

By Its Treasurer, F. W. McCHESNEY.

Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy Six (76) \$500—Bonds of the Kona Sugar Co.—numbered from 1 to 76 both inclusive.

(Signed)

W. W. BIERCE, LTD.,
By H. T. GILBERT.

(Sig.) RALPH C. SHAW, *Com'r.*

475

EXHIBIT W.

\$37,044.53.

HONOLULU, H. I. March 13, 1901.

Six months after date we promise to pay to the order of Wm. W. Bierce, Limited, at the Whitney National Bank of New Orleans, La. U. S. A., the sum of Thirty Seven Thousand and Forty Four Dollars and 53/100 (\$37,044.53) with interest at the rate of seven and one half per cent. per annum until paid, both principal and interest payable in Gold Coin of the United States.

Secured by Bonds of the Kona Sugar Co. of the normal value of Thirty Eight Thousand Dollars (\$38,000) (Seventy six Bonds of

the value of \$500.00 each, numbered from 1 to 76 both numbers inclusive.)

(Signed) THE KONA SUGAR CO., LTD.,
By Its President, J. M. McCHESNEY.

By Its Treasurer, F. W. McCHESNEY.

Endorsed: #32 Pay to the order of Harry T. Gilbert, W. W. Bouden Sec't'y & Treas. W. W. Bierce Ltd. W. W. Bouden, Sec't'y & Treas. Wm. W. Bierce Limited. By Wm. W. Bierce Pre'd't. Harry T. Gilbert Wm. W. Bierce Ltd. by C. Bierce V. Pres't.

\$7.50 revenue stamps.

(Sig.) RALPH C. SHAW.

476 UNITED STATES OF AMERICA,
State of Louisiana:

By This Public Instrument of Protest,

Be it known, that on this sixteenth day of September, in the year One Thousand Nine Hundred and One, at the request of the Whitney National Bank of New Orleans, holders of the Original Note whereof a true copy is on the reverse hereof written, I Ambrose G. La Pice, a notary public in and for the city of New Orleans and the parish of Orleans, State of Louisiana aforesaid, duly commissioned and sworn, Presented the said note to the Cashier, at the Whitney National Bank of New Orleans in this city, where it is made payable, and demanded payment thereof, which was refused because no funds had been deposited in said bank to pay the same.

Whereupon, I the said Notary, at the request aforesaid, did protest, and by these Presents do Publicly and solemnly Protest, as well against the drawer or maker of the said Note as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges and interests, suffered or to be suffered for want of payment of the said Note.

Thus done and protested, In the Presence of Gustave Le Gardeur Jr. and Philip J. Le Gardeur Witnesses.

Original Signed G. Le Gardeur Jr. P. J. Le Gardeur, A. G. La Pice, Not. Pub.

A True Copy of the Original Protest on file and of record in my office.

(Signed)
[NOTARY'S SEAL.]

A. G. LA PICE.
Not. Pub.

(Sig.) RALPH C. SHAW, *Com'r.*

477 \$37,044.53. HONOLULU, H. I., March 13, 1901.

Six months after date we promise to pay to the order of Wm. W. Bierce Limited, at the Whitney National Bank of New Orleans,

La., U. S. A., the sum of Thirty seven thousand and forty four Dollars and 53/100 (\$37,044.53) with interest at the rate of Seven and one half per cent. per annum until paid, both principal and interest payable in Gold Coin of the United States, secured by bonds of the Kona Sugar Co. of the nominal value of Thirty eight thousand Dollars (\$38,000) Seventy six Bonds of the value of \$500.00 each numbered from 1 to 76 both numbers inclusive.

THE KONA SUGAR CO., LTD.,

By Its President, J. M. McCHESNEY.

By Its Treasurer, F. W. McCHESNEY.

Endorsed: Pay to the order of Harry T. Gilbert, W. W. Bouden, Sec'ty & Treas. Wm. W. Bierce Limited by Wm. W. Bierce Pre'd't. Harry T. Gilbert Wm. W. Bierce Ltd. W. W. Bouden, Sec'ty & Treas. Wm. W. Bierce Ltd. by C. Bierce V. Pres't.

(Sig.) RALPH C. SHAW, *Com'r.*

478 Interrogatories of William W. Bierce Limited propounded to the said HARRY T. GILBERT, a witness produced and sworn as aforesaid, on the part of said William W. Bierce Limited, and his answers thereto, as follows:

Interrogatory 1st. What is your name?

Answer to Interrogatory 1st. My name is Harry T. Gilbert.

Interrogatory 2nd. What is your business at the present time?

Answer to Interrogatory 2nd. My business at the present time is the railway supply business.

Interrogatory 3rd. What was your business in the year 1900?

Answer to Interrogatory 3rd. My business in the year 1900 was in the employ of William W. Bierce, Limited, acting as their representative in the railway equipment and plantation supply department.

Interrogatory 4th. If your answer to the last preceding interrogatory is that in the year 1900 you were acting as the agent and representative of William W. Bierce, Limited, please examine the Interrogatory- Nos. 15 to 24 inclusive and 36 propounded to Columbus Bierce by William W. Bierce in the above entitled cause and also the respective answers to the said interrogatories by Columbus Bierce and state if you know who is the Harry T. Gilbert referred to therein.

Answer to Interrogatory 4th. I have examined Interrogatories Nos. 15 to 24 inclusive and number 36, propounded to Columbus Bierce and also his answers to the said interrogatories and the Harry T. Gilbert referred to therein is myself.

Interrogatory 5th. If your answer to Interrogatory 3 is that in the year 1900 you were acting as the representative of William W. Bierce, Limited, state in what portion of the United States, if any, you were, during the middle and latter portion of the year 1900,

Answer to Interrogatory 5th. During the latter part of the year 1900, while acting as the representative of William W. Bierce,

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479 Limited, I was in San Francisco, California.

Interrogatory 6th. If your answer to the last preceding Interrogatory is to the effect that you were in San Francisco, state in what capacity you were there.

Answer to Interrogatory 6th. I was in San Francisco acting in the capacity of representative of William W. Bierce, Limited, during the latter part of the year 1900, there endeavoring to collect for William W. Bierce, Limited, the price of certain railroad equipment, shipped by William W. Bierce, Limited, to the Kona Sugar Company, Limited.

Interrogatory 7th. State in detail what, if anything, you did in San Francisco in connection with certain railroad equipment that William W. Bierce, Limited, had shipped to the Hawaii Islands at the request of the Kona Sugar Company, Limited.

Answer to Interrogatory 7th. I arrived in San Francisco December 22, 1900, and remained there four days during which time my efforts were confined to visits to and inquiries of J. M. McChesney's father, M. W. McChesney, in reference to the financial condition and status of the Kona Sugar Company, Limited, which was barren of any results. I found, upon my arrival, no officer or representative of the Kona Sugar Company, Limited, in San Francisco, and, in compliance with the request of William W. Bierce, Limited, I proceeded to Honolulu for the purpose of collecting the purchase price of the railroad equipment and materials shipped by William W.

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480 Bierce, Limited, to the Kona Sugar Company, Limited.

Interrogatory 8th. State when you left San Francisco.

Answer to Interrogatory 8th. I left San Francisco on the 26th of December 1900.

Interrogatory 9th. State to where you went from San Francisco.

Answer to Interrogatory 9th. From San Francisco, I proceeded direct to Honolulu, Oahu, Territory of Hawaii.

Interrogatory 10th. If your answer to the last preceding interrogatory is to the effect that after leaving San Francisco, you went to Honolulu, Hawaiian Islands, state on what business you went there.

Answer to Interrogatory 10th. I went to Honolulu from San Francisco at the request of William W. Bierce, Limited, for the purpose of collecting for William W. Bierce, Limited, from the Kona Sugar Company, Limited, the price of certain railroad equipment, shipped by the former to the latter.

Interrogatory 11th. If in answer to the last preceding interrogatory, you have stated that you went to Honolulu on business in connection with certain railroad equipment, shipped to the Hawaiian Islands by William W. Bierce, Limited, state where, if anywhere,

you found the said railroad equipment after your arrival in Honolulu.

Answer to Interrogatory 11th. Upon my arrival at Honolulu, I found the railroad equipment shipped by William W. Bierce, Limited, to the Kona Sugar Company, Limited, stored adjacent to the wharf.

Interrogatory 12th. State in whose possession the said railroad

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481 equipment was.

Answer to Interrogatory 12th. I found the railroad equipment in question in the possession of the steamship company by which it was carried from San Francisco to Honolulu. I do not remember the name of the transportation company.

Interrogatory 13th. State in detail what transactions, if any, you had with the Kona Sugar Company, Limited, with reference to this railroad equipment.

Answer to Interrogatory 13th. After repeated and numerous visits and conversations with J. M. McChesney, President of the Kona Sugar Company, Limited, I realized it was utterly impossible to collect in cash the full amount of the purchase price of the material of the railroad equipment shipped by William W. Bierce, Limited, to the Kona Sugar Company, Limited, and proposed a settlement on the basis of \$20,000 cash, balance by note at 7 per cent. interest to be secured by \$30,000 of 15 year 6 per cent. bonds of the Kona Sugar Company, Limited. This proposition Mr. J. M. McChesney told me in person he would take up with the bank in Honolulu and ascertain whether or not they were willing to let him have the funds with which to settle upon this basis. A day after the submission of my proposition, Mr. J. M. McChesney sent for me and told me the very best he could do was \$5,000 in cash, the balance by promissory note, secured by \$40,000 of 15 year 6 per cent. bonds of the Kona Sugar Company, Limited. This proposition was rejected and I submitted a counter proposition of \$10,000 cash, balance by promissory note,

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482 secured by \$38,000, 15 year six per cent. bonds of the Kona Sugar Company, Limited, upon the condition that the railroad equipment in question was to remain the property of William W. Bierce, Limited, until the note should be fully paid. After a day's consideration, this proposition was agreed upon verbally between myself and Mr. J. M. McChesney, and was thereupon reduced to writing, signed by me in behalf of William W. Bierce, Limited, and accepted in writing by Mr. J. M. McChesney, in behalf of the Kona Sugar Company, Limited, under date of March 13th, 1901, and has been attached to the deposition of Mr. Columbus Bierce, taken in this cause, identified as "Exhibit B." At the same time of the acceptance and delivery to me by the Kona Sugar Company, Limited, of the instrument last mentioned by me, I received from

the Kona Sugar Company, Limited, its two drafts for \$5,000 each, in the form of New York Exchange, payable to the order of William W. Bierce, Limited, and its one promissory note, bearing date March 13th, 1901, for \$37,044.53, payable 6 months after date to the order of William W. Bierce, Limited, at the Whitney National Bank of New Orleans, Louisiana, bearing interest at the rate of $7\frac{1}{2}$ per cent. per annum, both principal and interest payable in gold coin of the United States, and also at the same time, I received as collateral to said note 76 bonds of the Kona Sugar Company, Limited, of the par value of \$500 each, of \$38,000 in the aggregate, numbered from 1 to 76 both inclusive. Thereupon, I caused to be delivered by the

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483 bank of Bishop and Company to the Kona Sugar Company, Limited, the bills of lading of the various shipments of the railroad equipment in question, released from the drafts elsewhere mentioned in my testimony, which were cancelled.

Interrogatory 14th. State what conversation, if any, you had with the Kona Sugar Company, Limited, in reference to this railroad equipment.

Answer to Interrogatory 14th. This railroad equipment was shipped by William W. Bierce, Limited, to Honolulu by way of San Francisco, and at the time of making each shipment, the same was billed to the order of William W. Bierce, Limited, to Honolulu, Hawaiian Islands, with directions written on each bill of lading to notify the Kona Sugar Company, Limited, at point of destination, the bill of lading being endorsed by William W. Bierce, Limited, to the order of The Kona Sugar Company, Limited. At the same time, a draft against the price of the shipment was drawn by William W. Bierce, Limited, on the Kona Sugar Company, Limited, and was sent forward with the bill of lading of the shipment thereto attached for collection through the bank in the usual course of business. Upon my arrival at Honolulu, I found these drafts drawn against the prices of the various shipments of the railroad equipment in question with the bills of lading thereto attached in the bank of Bishop and Company for collection, by whom they had been received for that purpose in the usual course of business. Upon my arrival at Honolulu, I called at the Banking house of Bishop and Company and saw these bills of lading and drafts and was told by Mr. Carter and Mr. Damon, both representatives of the bank that

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484 the drafts in question had been presented to the Kona Sugar Company, Limited, for payment and that payment thereof had been demanded by the bank from the Kona Sugar Company, Limited, but had been refused. I then called at the offices of the Kona Sugar Company, Limited, in Honolulu, where I met Mr. J. M. McChesney, President, and Fred McChesney, Secretary and Treasurer of the Company, and told them that I had seen the drafts and

bills of lading at the bank of Bishop and Company and found that payment of the drafts had been refused and inquired of them why the drafts had not been paid and the bills of lading taken up by the Kona Sugar Company, Limited, whereupon Mr. J. M. McChesney replied that owing to the want of funds, the Kona Sugar Company, Limited, had been unable to pay the drafts. That he was using every endeavor to obtain funds which would enable them to pay the drafts and take up the bills of lading. At this conversation, Mr. J. M. McChesney asked me for an extension of a week or two's time in which to pay the drafts, which I told him I would grant. At the expiration of this extension of time, I again called at the offices of the Kona Sugar Company, Limited, where I again saw Mr. J. M. McChesney and had another conversation with him in which I inquired of him whether the company was then ready to pay the drafts in question and take up the bills of lading, to which inquiry, he answered that he had not yet been able to secure funds with which to pay the drafts and take up the bills of lading, and he again asked me for an short extension of time, which I told him I would grant. I afterwards had other conversations with J. M. McChesney, substan-

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485 tially to the same effect as those I have detailed. These conversations were repeated and numerous and always with the same result of lack of funds with which to pay the drafts, and were prolonged from the time of my arrival in Honolulu in the forepart of January, 1901, to early in March, 1901. At the first conversation had with J. M. McChesney at the offices of the Kona Sugar Company, Limited, upon my arrival in Honolulu, which I have mentioned, there was no one present except J. M. McChesney, Fred McChesney and myself. At the other conversations I have mentioned, the same persons were present and no one else. Finally, despairing of collecting the full purchase price of the railroad equipment in question in cash, I began to propose a settlement upon a different basis, as stated in my answer to the 13th interrogatory of this, my deposition.

Interrogatory 15th. Please examine Exhibit B attached to Interrogatory 24th of the Interrogatories of William W. Bierce, Limited, to be propounded to Columbus Bierce, in the above entitled cause and state, if you can, whether or not you ever saw before the said document attached to the said interrogatories as Exhibit B. The document referred to being a typewritten letter, dated March 13th, 1901, addressed to the Kona Sugar Company, Limited, and purporting to be signed by William W. Bierce, Limited, by H. T. Gilbert.

Answer to Interrogatory 15th. I have examined Exhibit B attached to the interrogatories and answers of Columbus Bierce, and specially referred to in Interrogatory 24. Yes, I have seen

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486 this document before. It was drafted and written by Mr. Ballou, of Kinney, Ballou and McClanahan in their offices in the Judd Building, Honolulu, at the dictation of Mr. Ballou of that firm, and at my request. This is also the same instrument referred to in my answer to the 13th Interrogatory of this, my deposition.

Interrogatory 16th. State whether or not the words "H. T. Gilbert" appearing twice on the second page of said Exhibit "B" referred to in the last preceding Interrogatory, immediately under the words "W. W. Bierce, Ltd." are your signature.

Answer to Interrogatory 16th. Yes. The words "H. T. Gilbert" appearing twice on the second page of said Exhibit "B" referred to in the last preceding Interrogatory, number 15, immediately under the words "W. W. Bierce, Ltd." are my genuine signature.

Interrogatory 17th. Have you ever seen J. M. McChesney of Honolulu, Hawaiian Islands, write?

Answer to Interrogatory 17th. Yes. I have seen J. M. McChesney of Honolulu, Hawaiian Islands, write on several occasions, and have repeatedly seen him sign his name.

Interrogatory 18th. If your answer to the last preceding Interrogatory is in the affirmative, please examine the words "J. M. McChesney" on the said page 2 of the said Exhibit "B" referred to in Interrogatories 15th and 16th and state if you know whether that is his signature.

Answer to Interrogatory 18th. Yes. The words "J. M. McChesney" appearing on page 2 of Exhibit "B" referred to in Interrogatories number 15 and 16 are the genuine signature of J. M. McChesney, I having been present and seen him affix the said signature.

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487 ture to the original document.

Interrogatory 19th. Have you ever seen F. W. McChesney of Honolulu, Hawaiian Islands, write?

Answer to Interrogatory 19th. Yes. I have seen F. W. McChesney of Honolulu, Hawaiian Islands, write on several occasions and have repeatedly seen him sign his name.

Interrogatory 20th. If your answer to the last preceding Interrogatory is in the affirmative, please examine the signature of F. W. McChesney on the said second page of the said Exhibit "B" referred to in Interrogatory- 15, 16, 17 and 18, and state if you know whether or not that is his signature.

Answer to Interrogatory 20th. I have examined the signature of F. W. McChesney appearing on the second page of Exhibit "B" referred to in Interrogatories numbers 15, 16, 17 and 18, and I know that it is the genuine signature of F. W. McChesney, I having been present and seen him sign his name to said original document.

Interrogatory 21st. Please examine the exhibits attached to the answers of Columbus Bierce to the interrogatories propounded to him in the above entitled cause, by William W. Bierce, Limited, and state if you can whether or not you ever saw before the document

attached to the said answers as an exhibit to answer 30 of said interrogatory. The said answer being in answer to Interrogatory 30 of the said Interrogatories and the document referred to being in the form of a promissory note for \$37,044.53, dated Honolulu, March 13th, 1901, and purporting to be signed by the Kona

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488 Sugar Company, Limited, by its President, J. M. McChesney, and by its Treasurer, F. W. McChesney, and the said note purporting to be endorsed to the order of Harry T. Gilbert by Wm. W. Bierce, Limited, by Wm. W. Bierce, President, and W. W. Bouden, Secretary and Treasurer, and purporting to be endorsed in blank by Harry T. Gilbert and purporting to be endorsed in blank by Wm. W. Bierce, Limited, by W. W. Bouden, Secretary and Treasurer, and by Columbus Bierce, Vice President.

Answer to Interrogatory 21st. I have examined the exhibits attached to the answers of Columbus Bierce to the interrogatories propounded to him by William W. Bierce, Limited. Yes. I have seen before the document attached to the said answers as an exhibit to Answer 30 of interrogatories, the same being a promissory note for \$37,044.53, dated Honolulu, March 13th, 1901, signed "The Kona Sugar Company, Limited" by its President, J. M. McChesney, and by its treasurer F. W. McChesney and endorsed to the order of myself, Harry T. Gilbert, by William W. Bierce, Limited by William W. Bierce, President and W. W. Bouden, Secretary and Treasurer. Furthermore, endorsed in blank by myself Harry T. Gilbert as well as endorsed in blank by William W. Bierce, Limited, by W. W. Bouden, Secretary and Treasurer, and by Columbus Bierce, Vice President.

Interrogatory 22nd. State, if you know, whether or not, the words "Harry T. Gilbert" appearing on the back of said exhibit referred to in the last preceding interrogatory immediately under the words "By Wm. W. Bierce, pre'd't" are your signature.

Answer to Interrogatory 22nd. Yes. The words "Harry T. Gil-

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489 bert" appearing on the back of said exhibit referred to in Interrogatory number 21, immediately under the words "By Wm. W. Bierce, pre'd't" are my genuine signature.

Interrogatory 23rd. If your answer to Interrogatory 17 is in the affirmative, please examine the words "J. M. McChesney" on the face of the exhibit referred to in Interrogatory 21, the said words being at the bottom of the said exhibit and immediately under the words "by its President" and state if you know whether or not the said words "J. M. McChesney" are the signature of J. M. McChesney, referred to in Interrogatory 17.

Answer to Interrogatory 23rd. I have examined the words "J. M. McChesney" on the face of the exhibit referred to in Interrogatory number 21, the said words being at the bottom of said exhibit and

immediately under the words "by its President" and I know that the said words "J. M. McChesney" are the genuine signature of J. M. McChesney, referred to in Interrogatory number 17.

Interrogatory 24th. If your answer to Interrogatory 19 has been in the affirmative, please examine the words "F. W. McChesney" upon the face of the exhibit referred to in the last preceding interrogatory in the letter, left corner thereof, immediately under the words "by its Treasurer" and state if you can whether or not the words "F. W. McChesney" are the signature of the said F. W. McChesney referred to in Interrogatory 19.

Answer to Interrogatory 24th. I have examined the words "F. W. McChesney" upon the face of the exhibit referred to in the last preceding interrogatory in the lower left hand corner thereof, immediately under the words "by its Treasurer" and I know that the said

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490 words "F. W. McChesney" are the genuine signature of the said F. W. McChesney referred to in Interrogatory number 19.

Interrogatory 25th. State if you know what, if anything, was done with the railroad equipment already referred to, after March 13th, 1901.

Answer to Interrogatory 25th. After March 13th, 1901, the railroad equipment in question was transported from Honolulu, Island of Oahu, to the Kona District of the Island of Hawaii, and there used in constructing and operating the Plantation railroad of the Kona Sugar Company, Limited. In the latter part of December, 1901, I made a second trip to Honolulu, Hawaiian Islands, as a representative of William W. Bierce, Limited, for the purpose of collecting the unpaid balance of the purchase price of the railroad equipment in question, and, on this occasion, I visited the Island of Hawaii, and the plantation of the Kona Sugar Company, Limited, and while there saw the railroad equipment in question was used and operated in constructing and running the Plantation Railroad of the Kona Sugar Company, Limited, in connection with its sugar mill, and I then saw the locomotives and cane cars in operation in the work of hauling cane to the mill.

Interrogatory 26th. If your answer to the last preceding Interrogatory has been, among other things, to the effect that it was delivered to the Kona Sugar Company, Limited, state if you know in detail of the articles of railroad equipment with those delivered.

Answer to Interrogatory 26th. Yes. I do know in detail what articles of railroad equipment were conditionally delivered by Wil-

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491 liam W. Bierce, Limited, to the Kona Sugar Company, Limited, on or about March 13th, 1901, and said articles in detail are as follows:

10 sets #35 # split switches.....	\$545.00
180 kegs spikes.....	1,440.00
1 9 x 14 Dickson Loco.....	3,755.00
1 Re-railer.....	25.00
4 Track gauges.....	8.00
1 Rail bender.....	35.00
1 Track drill.....	12.50
1 Section car.....	90.00
2 Jacks.....	36.00
1 25 ton track scale.....	500.00
Rails 365 G. T.....	16,813.42
Angle bars.....	1,520.68
1 10 x 16 3' Gauge Locomotive.....	4,495.00
16 Flat cars.....	5,440.00
	<hr/>
	\$35,715.60

(Signed)

HARRY T. GILBERT.

Subscribed and sworn to before me this 26th day of September,
A. D. 1903.

(Signed)

RALPH C. SHAW,

Commissioner.(Sig.) RALPH C. SHAW, *Com'r.*

492 STATE OF ILLINOIS,
Cook County, ss:

I, Ralph C. Shaw, of the City of Chicago, in the County of Cook and State of Illinois, a commissioner duly appointed to take the depositions of the said Columbus Bierce and Harry T. Gilbert, witnesses, whose names are subscribed to the foregoing depositions respectively, do hereby certify that previous to the commencement of the examination of the said Columbus Bierce and Harry T. Gilbert, as witnesses in the said suit between the said R. W. McChesney, J. M. McChesney and F. W. McChesney, carrying on business under the name of M. W. McChesney & Sons, plaintiffs, and the said Kona Sugar Company, Limited, et al., defendants, and the said Kapiolani Estate, Limited, et al., intervenors, they were duly severally sworn by me as such commissioner to testify the truth in relation to the matters in controversy between the said William W. Bierce, Limited, and the said plaintiffs, defendants and other intervenors in said suit, so far as they should be interrogated concerning the same; that the said depositions were taken at Room 1412 Monadnock Block, in the City of Chicago, in the County of Cook and State of Illinois, on the 26th day of September, A. D. 1903; and that after said depositions were taken by me as aforesaid, the interrogatories and answers thereto as written down of the said deposition of Columbus Bierce were read over to the said witness, Columbus Bierce, and that thereupon the same was signed and sworn to by the said Columbus Bierce before me, the oath being administered by me, the said Ralph C. Shaw, as such commissioner, and the interrogatories and answers thereto as

written down of the said deposition of Harry T. Gilbert were read over to the said witness, Harry T. Gilbert, and thereupon the same was signed and sworn to by the said Harry T. Gilbert before me, the oath being administered by me, the said Ralph C. Shaw, as such commissioner, at the place and on the day and year last aforesaid.

In witness whereof, I have hereunto set my hand and seal, this 26th day of October, A. D. 1903.

(Signed)

RALPH C. SHAW,
Commissioner.

Commissioner's Fees \$ Fifty Dollars \$50.00.

Paid by William W. Bierce, Limited.

(Signed)

RALPH C. SHAW,
Commissioner.

494 Attach copy to depn. as "Exhibit Z."

Ex. 3.

["NEW ORLEANS, Dec. 23, 1899.

"The bearer Mr. Frank Davies has been duly appointed manager of the Supply Department of this corporation, and as such is authorized to enter into such contract in the name of the corporation as in his judgment may insure to its benefit. Contracts so made by him will be executed and signed."

WILLIAM W. BIERCE, LIMITED,
By WILLIAM W. BIERCE, *President.*"]*

Exhibit "Z."

(Sig.) RALPH C. SHAW, *Com'r.*

495 EXHIBIT A. R. C. S., *Com'r.*

PL'FF's EXH. "B."

William W. Bierce, General Southern Agent, Illinois Steel Co., Chicago, Illinois, 1106, 1107, 1108, 1109, and 1110 Hennen Building, New Orleans, La., U. S. A.

Cotton Ties, Steel Rails, Frogs, Switches, Plate, Cement.

Quotations subject to change without notice.

All agreements contingent upon strikes, accidents and other delays unavoidable and beyond control.

[* Words and figures enclosed in brackets erased in copy.]

Duplicate.

HONOLULU, HAWAIIAN ISLANDS, *Feb. 21st, 1900.*

Kona Sugar Company, Hawaiian Islands.

GENTLEMEN: For the sum of Forty Six (\$46.40) Dollars and forty cents per ton of 2,240 pounds, we propose to furnish you with five hundred and fifty (550) Tons of first quality Steel "T" Rails, weighing 35 lbs. to the yard. Also, to furnish sufficient complete joints to lay said Rails for the sum total of Two Thousand Two Hundred and Eighty One (\$2,281.00 Dollars, one complete joint being furnished for each Rail; a complete joint consisting of two Angle Bars and four bolts. Also, for the sum of One Thousand Four Hundred and Forty (\$1,440.00) Dollars to furnish sufficient $4\frac{1}{2}$ " x $\frac{1}{2}$ " Railroad Track Spikes to lay the 550 Tons of Rails with cross ties 2' between centers.

The above prices are all freight prepaid to Honolulu, the Kona Sugar Company to reimburse Bierce for the insurance to — paid thereon.

We are also to furnish for the sum of Five hundred and Forty Five (\$545.00) Dollars, c. i. f. prepaid to Honolulu, ten sets of 35 lb. 6" Split Switch points, tie rods and slide plates; all designed for 3' gauge of track.

Further, to furnish sixteen (16) cars, 20' long, 7' wide and states 5' high above floor line, for 3' gauge of track; as per the following specifications: price to be three hundred and forty (\$340.00) dollars per car c. i. f. prepaid to Honolulu.

Lumber.

- 6 Longitudinal Sills, 4" x 8" Pine.
- 2 End Sills, 6" x 10" Oak (planking 2").
- 2 Sub End Sills, $5\frac{1}{2}$ " x 6" Oak.
- 4 Draft Timbers, $2\frac{1}{2}$ " x $5\frac{1}{2}$ ", Oak.
- 2 Cross Ties, 3" x 5" Oak.
- 6 End Stakes, 4" x 5" Oak, 5' above floor line of car.
- Filler blocks of Oak.

Construction.

Sills will be mortised and tenoned to fit. Draft timbers will be bolted to both center sills, and sills and sub end sills, and be protected by cast iron mortise blocks. Cross ties will support car in center in conjunction with truss rods. End stakes will be mortised into end sills, and braced with angle or T iron for 3' of their length. All wood to be coated with mineral paint; all iron work with asphaltum.

No floor planks, or side stakes shall be furnished.

Trucks.

Two Standard Trucks of the diamond type, provided each with four wheels, chilled charcoal iron, 24" in diameter, $3\frac{1}{2}$ " tread, 275 lbs. each, mounted on axles $3\frac{3}{4}$ " diameter; Journals $3\frac{1}{2}$ " diameter and having solid brass journal bearings. The top arch bar shall be 3" x 1", the inverted arch bar 3" x $\frac{3}{4}$ " and the tie bars 3" x $\frac{5}{8}$ ", bent to shape and drilled $\frac{3}{4}$ " column and journal box bolts. Journal boxes of cast iron provided with spring lid and hinged at the top. Bolster springs are to be in nests of four each, provided with plates top and bottom and of such sizes and dimensions to suit capacity of cars. Truck bolsters shall be 1

(Endorsed on the back: "M. W. McChesney & Sons.")

496

EXHIBIT A, pp. 2. R. C. S., Com'r.

William W. Bierce, General Southern Agent, Illinois Steel Co., Chicago, Illinois, 1106, 1107, 1108, 1109, and 1110 Hennen Building, New Orleans, La., U. S. A.

Cotton Ties, Steel Rails, Frogs, Switches, Plate, Cement.

Quotations subject to change without notice.

All agreements contingent upon strikes, accidents and other delays unavoidable and beyond control.

Kona Sugar Co. No. 2.

Beams and Channels—there shall be no wood work of any kind in the truck proper. Body bolster shall be of steel.

Stake Pockets.

Side Stake pockets, 24 in number (12 on each side of the car) of malleable iron for $3\frac{1}{2}$ " x $3\frac{1}{2}$ " stake at top, and diminishing to 3" x 3" at bottom. They shall be fastened to outside sill with $\frac{5}{8}$ " U bolt, said U bolt passing through filler block to intermediate sills and fastened with nut on cast iron washer.

Ends.

The end stakes shall be tenoned into end sills and braced in front with T or angle for 3' of the stake, and further braced with malleable iron bracket at end of car. Shall be bored for $\frac{1}{2}$ " bolts to hold planking in position. Shall be held in position at bottom each by two $\frac{5}{8}$ " eye bolts, passing through bottom of stake and sill and fastened to intermediate sills.

Draw Gear.

Draw gear consists of Cast Iron drawheads, wrought iron follower plates, guides, etc., with draw springs and cast iron draw bar stops. Draw timbers are secured to center sills each with two $\frac{5}{8}$ " bolts, provided with cup, washers on top and double nuts and wrought iron washers on bottom. Are further secured to buffer blocks (sub end sills) with four $\frac{5}{8}$ " bolts. Drawbar carrier is made of $2\frac{1}{4}$ " x $\frac{3}{8}$ " with ends gibbed to prevent draw timbers from spreading. Buffer block, or sub end sill is faced with plate of 4" x 8" iron.

Brake.

Car equipped with hand brake on each Truck each with end wheel working on end sill.

General.

Lumber entering into the manufacture of this car to be of good merchantable quality. Cars are to be shipped knocked down. All work to be done in a thorough and workmanlike manner. Car guaranteed for fifteen (15) tons carrying capacity.

The locomotives to be furnished are as follows:

One 9" x 14", Class "A," Saddle Tank locomotive of the Dickson Locomotive Works make, as per photograph attached, signed by both parties: hereto for identification. Price of this locomotive to be Three Thousand Seven Hundred and Fifty Five (\$3,755.) Dollars, c. i. f. prepaid to Honolulu. This locomotive to be for 36" gauge, marked "Kona Sugar Company," "No. 1," and to be fitted with steam brake.

Also—

One 10" x 16", Class "M," back truck Saddle Tank Locomotive, with six driving wheels, to be manufactured by the Dickson Locomotive Works, for 36" gauge, to be fitted with steam brake and a duplicate in construction of the "Halawa," photo signed by both parties and attached hereto for identification. The approximate weight of this locomotive ready for service will be 38,000 pounds, 31,500 lbs. of which will be carried on the driving wheels. The driving wheels of this locomotive will be 33" diameter, whilst those under the trucks will be 18" diameter. The boiler pressure will be 150 lbs., water capacity 500 gallons, piston rod of machine steel; to have two sand boxes one forward and one back of the driving wheels, to be furnished with bal-oon shaped stack with spiral cone provided with steel wire netting. Cross head pump to be on right side and injector on left side. Fire box of steel. Price of this loco-

(Endorsed on the back: "M. W. McChesney & Sons.")

497

Ex. "A," pp. 3. R. C. S., Com'r.

William W. Bierce, General Southern Agent, Illinois Steel Co., Chicago, Illinois, 1106, 1107, 1108, 1109, and 1110 Hennen Building, New Orleans, La., U. S. A.

Cotton Ties, Steel Rails, Frogs, Switches, Plate, Cement.

Quotations subject to change without notice.

All agreements contingent upon strikes, accidents and other delays unavoidable and beyond control.

Kona Sugar Co. No. 3.

tive to be five Thousand Four Hundred and Ninety Five (\$5,495.00) Dollars c. i. f. prepaid to Honolulu. Locomotive to be marked "Kona Sugar Company," "No. 2."

These locomotives will each have two headlights, be constructed for use of either wood or coal as fuel; sold and guaranteed to be of best material, workmanship and design, and equal in every degree to locomotive of same size and type built and manufactured by the Baldwin Locomotive Works.

Lastly, there is to be furnished one "Howe" Narrow Gauge Track Scale, to have a capacity of 25 Tons, platform 30' in length—foundation plan to be furnished by us—timber, work and foundation to be furnished by the Kona Sugar Company. Price \$500.00 c. i. f. prepaid to Honolulu.

Deliveries.

Shipment of one-third of the Rails, joints therefor, all the spikes, all the switches, four cars, the 9" x 14" Locomotive, and the scales from works in four months after acceptance of this proposition; another one-third of the rails, together with the joints therefor, in five months after acceptance of this proposition; the balance of the Rails and Joints in six months after acceptance of this proposition; the balance of the cars (12) and the 10" x 16" locomotive may be shipped at any time to insure delivery at Honolulu December 1st to 15th after signing of contract.

Terms of Payment.

Cash upon presentation of demand draft attached to bill of lading, issued by initial line of railroad, showing material to have been shipped through to Honolulu. Insurance policy shall be transmitted as soon as possible after shipment is made, when it shall be determined just what vessel shall haul the material from port on mainland to Honolulu.

All monies are payable in New York or Chicago funds; the Kona Sugar Company to pay all items of exchange.

Twenty five hundred (\$2,500.00) Dollars in paid up stock of the Kona Sugar Company shall be the first payment on account of the purchases herein proposed; this \$2,500.00 to be covered by 5% deductions from the materials as shipped. Bierce agrees to deposit this \$2,500.00 stock of the Kona Sugar Company with the Banking House of Bishop & Company in the City of Honolulu, as guarantee for the final consummation of the contract.

NOTE.—Where reference herein is made to Honolulu as point of delivery—if vessels are available about time material is ready to ship sellers will make delivery at Kailua, District of Kona, in the Hawaiian Islands; but this is not to be construed as in any manner obligatory or binding.

This proposition is a confirmation of the verbal one made to

(Endorsed on the back: "M. W. McChesney & Sons.")

498

Ex. "A," pp. 4. R. C. S., Com'r.

William W. Bierce, General Southern Agent, Illinois Steel Co., Chicago, Illinois, 1106, 1107, 1108, 1109, and 1110 Hennen Building, New Orleans, La., U. S. A.

Cotton Ties, Steel Rails, Frogs, Switches, Plate, Cement.

Quotations subject to change without notice.

All agreements contingent upon strikes, accidents and other delays unavoidable and beyond control.

Kona Sugar Co. No. 4.

the Directors of the Kona Sugar Company at their meeting, Saturday, February 17th, 1900, and becomes binding on all parties when accepted by their agents, M. W. McChesney & Sons.

When duly accepted and made binding, said contract is amenable to the laws of the Hawaiian Islands in effect at date of signing.

Yours very truly,

(Signed)

WILLIAM W. BIERCE, LTD.,
By FRANK DAVIES.

Accepted in duplicate by

THE KONA SUGAR CO., LTD.,
(Signed) By M. W. McCHESNEY & SONS, *Agents*.

This 22d day of February, 1900.

Truss Rods on cars 4 in number, 1" dia. upset ends 1 1/8" — Turnbuckles 1".

(Signed)

W. W. BIERCE, LTD.,
By FRANK DAVIES.

(Endorsed on back: "M. W. McChesney & Sons.")

499

PL'FF'S EXH. "C."

Exhibit "Y." (Sig.) R. C. S., Com'r.

Know all men by these presents:

That, acting under the authority and pursuant to a resolution of the Board of Directors of William W. Bierce, Limited, a corporation organized under the laws of the State of Louisiana and domiciled in the City of New Orleans, a duly certified copy whereof is hereto annexed, I, the undersigned, William W. Bierce, President of the said William W. Bierce, Limited, for and on behalf of the said corporation do hereby constitute and appoint H. T. Gilbert, a resident of the City of New Orleans but temporarily abiding in the City of San Francisco, State of California, a true and lawful agent and attorney in fact of the said William W. Bierce, Limited, for and in the place of the said corporation, to endorse and dispose of, upon such terms as to him may seem fit and proper, a certain promissory note made by the Kona Sugar Company, Limited, of Honolulu, through its President, J. M. McChesney, for the sum of Thirty Seven thousand Forty Four Dollars Fifty Three Cents (\$37,044.53), dated March 13th, 1901, and payable six months after date to the order of William W. Bierce, Limited, at the Whitney National Bank of New Orleans, Louisiana, the said note being secured by 76 bonds of the said Kona Sugar Company, Limited, of the par value of Five Hundred Dollars (\$500.00) each, numbered from 1 to 76, both inclusive; and the said H. T. Gilbert is further authorized, for and on behalf of the said William W. Bierce, Limited, to transfer and dispose of the said bonds pledged as collateral as aforesaid, together with the said note.

In witness whereof, I have hereunto affixed my hand on this fifth day of April, 1901.

(Signed)

WM. W. BIERCE.

500

Ex. "Y," pp. 2. (Sig.) R. C. S., Com'r.

Before me, the undersigned authority, personally came and appeared William W. Bierce of the City of New Orleans, to me well known to be the person whose genuine signature is annexed to the foregoing document and to me well known to be the President of the Corporation known as William W. Bierce, Limited, of the City of New Orleans, who acknowledged before me, in the presence of E. W. Holden and Chas. Payne Tenner the undersigned competent witnesses, that he had signed the foregoing document under the authority of and pursuant to the resolution of the Board of Directors of William W. Bierce, Limited, a copy whereof is annexed thereto, and of his own free will and accord for the purposes therein mentioned.

In witness whereof, I have hereunto affixed my hand and seal, together with the said William W. Bierce and the said E. W. Holden

and Chas. Payne Tenner competent witnesses as aforesaid, on this fifth day of April, 1901.

(Signed)

WM. W. BIERCE.

(Signed) E. W. HOLDEN.

(Signed) CHAS. PAYNE TENNER.

(Signed)

J. G. EUSTIS,

[SEAL.]

Notary Public.

501

Ex. "Y," pp. 3. (Sig.) R. C. S., Com'r.

At a special meeting of the Board of Directors of William W. Bierce, Limited, held on the fifth day of April, 1901, at the office of the Company, the following resolution was offered and, upon motion, unanimously adopted.

Be it resolved, That William W. Bierce, the President of this Company, be and he is hereby authorized, for and on behalf of this Company, to execute in favor of H. T. Gilbert, a resident of this City but temporarily abiding in the city of San Francisco, State of California, a power of attorney authorizing the said H. T. Gilbert, for and on behalf of this Company, to endorse in the name of this Company, and to dispose of on such terms and conditions as to him may seem fit and proper, a certain promissory note executed by the Kona Sugar Company, Limited, through its President, J. M. McChesney, for Thirty Seven Thousand Forty Four Dollars and Fifty Three Cents (\$37,044.53), dated March 13th, 1901, and made payable six months after date to the order of William W. Bierce, Limited, at the Whitney National Bank of New Orleans, Louisiana, the said note being secured by seventy-six (76) mortgage bonds of the said Kona Sugar Company, Limited, of the par value of Five Hundred Dollars (\$500.00) each, the said bonds being numbered from 1 to 76, both inclusive; and the said William W. Bierce, President, is further empowered to authorize the disposition by the said H. T. Gilbert of the said bonds.

I, the undersigned, Secretary of William W. Bierce, Limited, hereby certify that the foregoing is a true extract from the minutes of the said company.

(Signed)

W. W. BOUDEN,

[SEAL.]

Secretary.

502

PL'FF'S EXH. "D."

Exhibit "B." (Sig.) R. C. S., Com'r.

Copy.

HONOLULU, H. T., Mar. 13, 1901.

Kona Sugar Company, Limited, Honolulu, H. I.

GENTLEMEN: In pursuance of the verbal arrangement made between your President and William W. Bierce, Limited, we hereby

offer the following terms in settlement of the contract between the Kona Sugar Company Limited and William W. Bierce Limited as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company, Limited Feb. 22, 1900:

We will take in settlement of this contract the sum of \$10,000, U. S. Gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of \$37,044.53, in favor of William W. Bierce, Ltd., payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent ($7\frac{1}{2}\%$) per annum and secured by First Mortgage Bonds of the Kona Sugar Company Limited of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding \$200,000. This offer is conditioned upon its acceptance by you — payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us, before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now

(Endorsed on the back "J. M. McChesney.")

Ex. "B," pp. 2. (Sig.) R. C. S., Com'r.

K. S. Co. #2.

503 awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Very truly yours,

(Signed)

W. W. BIERCE, LTD.,
By H. T. GILBERT.

The above terms are accepted this March 13, 1901.

[SEAL.]

THE KONA SUGAR CO.,
LTD.,

(Signed) By Its President, J. M. McCHESNEY,

(Signed) By Its Treasurer, F. W. McCHESNEY.

Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy-six (76) \$500-Bonds of the Kona Sugar Co. Numbered from 1 to 76 both inclusive.

(Signed)

W. W. BIERCE, LTD.,
By H. T. GILBERT.

504

PL'FF'S EXH. E.

Exhibit "W." (Sig.) R. C. S., Com'r.

M. W. McChesney & Sons. Importers & Wholesale Grocers. Dealers in Leather and Shoe Findings.

R. W. McChesney, 204 Front St., San Francisco. Honolulu Soap Works. Agents Honolulu Soap Works and Honolulu Tannery. Highest Prices Paid for Tallow & Hides.

J. M. McChesney, F. W. McChesney, Queen St., Honolulu, H. I.

\$37,044.53.

HONOLULU, H. I., *March* 13, 1901.

Six months after date we promise to pay to the order of Wm. W. Bierce, Limited, at the Whitney National Bank of New Orleans, La., U. S.A., the sum of Thirty Seven Thousand and Forty Four Dollars and 53/100 (\$37,044.53) with interest at the rate of seven and one half per cent. per annum until paid, both principal and interest payable in Gold Coin of the United States.

Secured by Bonds of the Kona Sugar Co. of the nominal value of Thirty Eight Thousand Dollars \$38,000 (Seventy six bonds of the value of \$500.00 each, numbered from 1 to 76 both numbers inclusive)

[SEAL.]

(Signed)

THE KONA SUGAR CO.,
LTD.,

(Signed) By Its President, J. M. McCHESNEY.

(Signed) By Its Treasurer, F. W. McCHESNEY.

(Endorsed on the back:)

#32.

Pay to the order of
Harry T. Gilbert,

(Sig.) W. W. Bouden,
Sec't'y & Treas.
Wm. W. Bierce, Ltd.,

(Sig.) W. W. Bouden,
Sec't'y & Treas.

Wm. W. Bierce, Limited,

(Sig.) By Wm. W. Bierce, Pre'd't. [SEAL.]

(Sig.) Harry T. Gilbert.

Wm. W. Bierce, Ltd.,

(Sig.) By C. Bierce, V.-Pres't.

\$7.50 revenue stamps.

505 Ex. "W," pp. 2. (Sig.) R. C. S., Com'r.

UNITED STATES OF AMERICA,
State of Louisiana:

By This Public Instrument of Protest

Be it known, that on this Sixteenth day of September in the year One Thousand Nine Hundred and one, at the request of the Whitney National Bank of New Orleans, holders of the Original Note whereof a true copy is on the reverse hereof written, I, Ambrose G. La Pice, a Notary Public in and for the City of New Orleans and the Parish of Orleans, State of Louisiana aforesaid, duly commissioned and sworn.

Presented the said note to the Cashier at the Whitney National Bank of New Orleans in this city where it is made payable, and demanded payment thereof which was refused because no funds had been deposited in said Bank to pay the same.

Whereupon, I, the said Notary, at the request aforesaid, did protest, and by these Presents do Publicly and solemnly Protest, as well against the drawer or maker of the said Note as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges and interests, suffered or to be suffered for want of payment of the said Note.

Thus done and protested, In the presence of Gustave Le Gardeur Jr. and Philip J. Le Gardeur Witnesses.

Original Signed G. Le Gardeur Jr. P. J. Le Gardeur, A. G. La Pice Not. Pub.

A true copy of the Original Protest on file and of record in my office.

[SEAL.]

A. G. LA PICE,
Not. Pub.

506 \$37,044.53. HONOLULU, H. I., March 13, 1901.

Six months after date we promise to pay to the order of Wm. W. Bierce Limited, at the Whitney National Bank of New Orleans, La. U. S. A., the sum of Thirty seven thousand and forty four Dollars and 53/100 (\$37,044.53) with interest at the rate of Seven and one half per cent. per annum until paid, both principal and interest payable in Gold Coin of the United States, secured by bonds of the Kona Sugar Co. of the nominal value of Thirty Eight Thousand Dollars (\$38,000) Seventy six Bonds of the value of \$500.00 each numbered from 1 to 76 both numbers inclusive.

THE KONA SUGAR CO., LTD.,
By Its President, J. M. McCHESNEY.

By its Treasurer,
F. W. McCHESNEY.

Endorsed: Pay to the Order of Harry T. Gilbert.
 W. W. Bouden, Sec't'y & Treas. Wm. W. Bierce, Limited,
 By Wm. W. Bierce, Pre'd't.
 Harry T. Gilbert.
 Wm. W. Bierce, Ltd. Wm. W. Bierce, Ltd.,
 W. W. Bouden, Sec't'y & Treas. By C. Bierce, V.-Pres't.

I, the undersigned Notary, do hereby certify, that the parties —
 Whereof a true copy *if* above written, have been duly notified
 of the Protest thereof, by letters to them, by me written, and ad-
 dressed, dated on the day of the said Protest and served on them
 respectively, in the manner following, viz:

.....

 In faith whereof, I have hereunto signed my name, together with
 — Witnesses, at New Orleans, this — Nineteen Hundred and
 —

(Signed)

507 I certify the foregoing to be true copies of the original —
 protest and certificate of the manner in which the notices
 were served, extant in the record of my office.

In Faith Whereof, I grant these presents under my signature and
 seal of Office, at New Orleans, this — Nineteen Hundred —

(Endorsed on the back hereof.)

N. C., La., Sept. 16th, 1901.

Protest.

Kona Sugar Co., Limited.

To {	Am't.....	\$37,044.53	A. Gold.
	Interest.....		
	Fees.....	3.52	

Wm. W. Bierce, Ltd.

Endorsed: 9/E. 1337. Circuit Court, Third Judicial Circuit, Ter-
 ritory of Hawaii. M. W. McChesney & Sons vs. The Kona Sugar
 Company, Limited, et al. Depositions of Columbus Bierce and Harry
 T. Gilbert. Rec'd and Filed Nov. 5th, 1903 4 o'clock P. M. J. P.
 Curts, Clerk. Law No. 6023 Plaintiff's Exhibit K. K. Filed May
 12th, 1908. Job Batchelor, Clerk.

508 In the Circuit Court of the First Judicial Circuit. In Probate.

At Chambers.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Creditor's Claim.

William W. Bierce, Limited, a corporation duly organized and existing under the laws of the State of Louisiana hereby presents its claim as hereinafter specified against the estate of the above named decedent Henry Waterhouse as follows.

The Estate of Henry Waterhouse, Deceased, to Wm. W. Bierce, Ltd.,
Dr.

To amount due as surety on redelivery bond in the case of Wm. W. Bierce, Ltd., vs. C. J. Hutchins, Trustee . . .	\$22,000.00
Interest on said sum from date of judgment	578.00
	<hr/>
	\$22,578.00

The particulars of this claim are briefly as follows:

On July 20th, A. D. 1903, William W. Bierce Ltd. filed in the Circuit Court of the Third Judicial Circuit an action in replevin against one Clinton J. Hutchins Trustee for the recovery of certain property consisting of rails, engines, cars, railroad equipment etc. and upon filing an approved bond were given possession of the property. Said Hutchins then filed a redelivery bond in said court with the decedent Henry Waterhouse and one A. B. Wood as sureties in the words and figures following:

509 Circuit Court, Third Circuit, Territory of Hawaii.

Stamps.

WILLIAM W. BIERCE, LTD., a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee.

Replevin.

Return Bond.

Know all men by these presents: That we Clinton J. Hutchins Trustee, as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bound unto William Bierce Company Ltd. its successor or successors and assigns in the sum of Thirty Thousand (30,000) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors herein and administrators jointly and severally by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies and turned over to said plaintiff, and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

Now therefore if the said property and all thereof shall be well and truly delivered the said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1904.

(Sig.)

CLINTON J. HUTCHINS, *Trustee.*

(Sig.)

HENRY WATERHOUSE, *Surety.*

(Sig.)

ARTHUR B. WOOD, *Surety.*

The foregoing Bond is approved as to its sufficiency of sureties.

(Sig.)

A. M. BROWN,

High Sheriff.

Dated July 21, 1903.

and thereupon said Hutchins resumed possession of said property. The cause was on December 17th, 1903 transferred to the First Circuit and on March 19th 1904 judgment was duly rendered in plaintiff's favor for a return of the property in question or, in case said property was not returned, for the sum of \$22,000 such being the value placed by the court upon the property. An appeal was taken from said judgment, but pending appeal execution was ordered to 510 issue upon good cause shown and did so issue, but was returned wholly unsatisfied. No delivery of the property in question has ever been made although duly demanded nor has any payment of the said sum of \$22,000 been made, although duly demanded, and William W. Bierce Ltd. claims that it has a just and good claim in the above mentioned sum against the estate of Henry Waterhouse, who was one of the sureties on said bond.

WILLIAM W. BIERCE, LIMITED,

Creditor,

By its Attorney in Fact,

(Signed)

S. H. DERBY.

HONOLULU, OAHU,

Territory of Hawaii, ss:

S. H. Derby being first duly sworn on oath deposes and says:

That he is the duly authorized and acting attorney in fact for William W. Bierce Limited the above named claimant in this juris-

diction; that said William W. Bierce Limited is a corporation duly organized and existing under the laws of the State of Louisiana, and has no other representative in this jurisdiction except affiant, and the firm of Kinney, McClanahan & Cooper, which is its legal representative that he knows the contents of the above claim and that the same is true of his own knowledge that no payments have been made thereon; that there are no off sets or counter claims in regard to the same, and that the same is now due and payable.

(Signed)

S. H. DERBY.

Subscribed and sworn to before me this 6th day of September,
A. D. 1904.

(Signed)

[SEAL.]

GUSSIE H. CLARK,

Notary Public, First Judicial Circuit.

Indorsements: Probate No. —. At Chambers. In Probate. First Judicial Circuit Territory of Hawaii. In the Matter of the Estate of Henry Waterhouse, deceased. Creditor's Claim. — Judge. Filed — 19—. — Clerk. Kinney, McClanahan & Cooper 302-305 Judd Bldg. Honolulu. Attorneys for — (Office No. —) No. 1 Claim. Law No. 6023 Plaintiff's Exhibit C. C. Filed May 11/08. Job Batchelor, Clerk.

511

SEPT. 26TH, 1904.

Messrs. Kinney, McClanahan & Cooper, Honolulu.

GENTLEMEN: Replying to your favor of the 23rd inst., I beg to state that the claim of Wm. W. Bierce Ltd. against the estate of Henry Waterhouse, dec'd, has been rejected, which said claim is returned herewith.

Yours very truly,

(Signed)

ALBERT WATERHOUSE,

Executor Estate of Henry Waterhouse (Deceased.)

Enc.

Indorsements: Plaintiff's Exhibit DD. Law No. 6023. Plaintiff's Exhibit DD. Filed May 11th, 1908. Job Batchelor, Clerk. Plaintiff's Exhibit DD.

512 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate.

At Chambers.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Creditor's Claim.

William W. Bierce Limited, a corporation duly organized and existing under the laws of the State of Louisiana hereby presents its claim as hereinafter specified against the estate of the above named decedent Henry Waterhouse as follows:

The Estate of Henry Waterhouse, Deceased, to Wm. W. Bierce, Ltd.,
Dr.

To amount due as surety on redelivery bond in the case of Wm. B. Bierce Ltd. vs. Clinton J. Hutchins, Trustee	\$22,000.
Interest on said sum from date of judgment.....	578.
	<hr/> \$22,578.00

The particulars of this claim are briefly as follows:

On July A. D. 20th 1903 William W. Bierce Ltd. filed in the Circuit Court of the Third Judicial Circuit an action in replevin against one Clinton J. Hutchins Trustee for the recovery of certain property consisting of rails, engines, cars, railroad equipment etc. and upon filing an approved bond were given possession of the property. Said Hutchins then filed a redelivery bond in said court with the decedent Henry Waterhouse and one A. B. Wood as sureties, a certified copy of which is hereto attached, and thereupon said Hutchins resumed possession of said property. The cause was on December 17th, 1903 transferred to the First Circuit and on March 19th 1904 judgment was duly rendered in plaintiff's favor for a return of the property in question or, in case said property was not returned, for the sum of \$22,000 such being the value placed by the court upon the property. An appeal was taken from said judgment, but pending appeal, execution was ordered to issue upon good cause shown and did issue, but was returned wholly unsatisfied. No delivery of the property in question has ever been made although duly demanded nor has any payment of the said sum of \$22,000 been made, although duly demanded, and William W. Bierce Ltd. claims that it has a just and good claim in the above mentioned sum against the estate of Henry Waterhouse, who was one of the sureties on said bond.

WILLIAM W. BIERCE, LIMITED, *Creditor*,

By Its Attorney in Fact,
(Signed) S. H. DERBY.

HONOLULU, OAHU,
Territory of Hawaii, ss:

S. H. Derby being first duly sworn on oath deposes and says:

That he is the duly authorized and acting attorney in fact for William W. Bierce Limited the above named claimant in this jurisdiction; that said William W. Bierce Limited is a corporation duly organized and existing under the laws of the State of Louisiana, and has no other representative in this jurisdiction except affiant, and the firm of Kinney, McClanahan & Cooper, which is its legal representative; that he knows the contents of the above claim and that the same is true of his own knowledge that no payments have been made thereon; that there are no off sets or counter claims in regard to the same, and that the same is now due and payable.

(Signed)

S. H. DERBY.

Subscribed and sworn to before me this 30th day of September
A. D. 1904.

[SEAL.]

(Signed) GUSSIE H. CLARK,
Notary Public, First Judicial Circuit.

514 Circuit Court, Third Circuit, Territory of Hawaii.

(\$1.00 Stamp.)

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

v.

CLINTON J. HUTCHINS, Trustee.

Replevin.

Return Bond.

Know all men by these presents:

That we Clinton J. Hutchins, Trustee as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns in the sum of Thirty Thousand (30,000) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, herein and administrators jointly and severally firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his Deputies and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

Now Therefore if the said property and all thereof shall be well and truly delivered to the said plaintiff, if said delivery be
515 adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Sig.)

"

"

CLINTON J. HUTCHINS, *Trustee.*
HENRY WATERHOUSE, *Surety.*
ARTHUR B. WOOD, *Surety.*

The foregoing Bond is approved as to its sufficiency of sureties.

(Sig.)

A. M. BROWN,
High Sheriff.

Dated July 21, 1903.

TERRITORY OF HAWAII,
Island of Hawaii, ss:

I hereby certify that the foregoing is a full, true and correct copy of the Original Return Bond, filed in the Circuit Court Third Circuit, in the case of William W. Bierce, Limited, a corporation, v. Clinton J. Hutchins, Trustee.

Witness my hand and the Seal of the Circuit Court, Third Circuit, Territory of Hawaii, this 30th day of October, A. D. 1904.

[SEAL.]

(Signed)

GEORGE LUCAS,
Clerk First Circuit Court.

Indorsements: Probate No. —. At Chambers. In Probate. First Judicial Circuit Territory of Hawaii. In the Matter of the Estate of Henry Waterhouse, deceased. Creditor's Claim. —, Judge. Filed —, 19—. —, Clerk. Kinney & McClanahan, 302-305 Judd Bldg., Honolulu, Attorneys for —. (Office No. —.) Claim No. 2. Law No. 6023. Plaintiff's Exhibit EE. Filed May 11, 1908. Job Batchelor, Clerk.

516 In the Circuit Court of the First Circuit, Territory of Hawaii.

L. 6023.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Commission to Take Testimony.

The Territory of Hawaii to William G. Wise, Esq., Chicago, Illinois, Greeting:

Having confidence in your prudence and fidelity you have been appointed, and by these presents you are hereby given full authority diligently to examine Columbus Bierce, Esq., and E. W. Holden, Esq., of Chicago, Illinois, witnesses in an action now pending in said Court between the above named parties upon the direct interrogatories and cross-interrogatories hereto annexed at a certain day and place to be appointed by you, and having first administered an oath to each of said witnesses, you will reduce their respective answers to writing and return the same with said interrogatories and this Commission to the Clerk of said Court.

Dated Honolulu, August 31, 1907.

By the Court:

[SEAL.]

(Signed)

J. A. THOMPSON, *Clerk.*

Endorsed: L. 6023. Circuit Court First Circuit Territory of Hawaii. Assumpsit. William W. Bierce, Limited v. Clinton J. Hutchins, Trustee, et al. Commission to Take Testimony. 517 Issued August 31, 1907 at 10:55 a. m. J. A. Thompson, Clerk.

518 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

L. 6023.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Direct Interrogatories Propounded by Plaintiff to Columbus Bierce.

1. State your name and residence?
2. What, if any, connection have you with the corporation, William W. Bierce, Limited?
3. How long have you been so connected?
4. Do you know what property was involved in an action of replevin tried in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in which William W. Bierce, Limited, was plaintiff, and Clinton J. Hutchins, Trustee, was defendant, in which a judgment was entered in favor of the plaintiff on March 19, 1904?
5. State whether said property, or any portion thereof, has, since the entry of said judgment, been delivered to the plaintiff?
6. State whether the value of said property, or any portion 519 thereof, has, since the entry of said judgment, been paid to the plaintiff?
7. State whether or not the amount of the damages for the detention of said property, as awarded in and by said judgment, have been paid to the plaintiff?

Endorsed: Circuit Court First Circuit Territory of Hawaii. William W. Bierce, Limited vs. Clinton J. Hutchins, Trustee, et al. Direct Interrogatories Propounded by Plaintiff to Columbus Bierce. Filed August 31, 1907 at 10:35 o'clock A. M. J. A. Thompson, Clerk.

520 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

L. 6023.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Cross-Interrogatories Propounded by the Defendants to Columbus Bierce.

1. State your place of residence, and whether at any time you have been within the Territory of Hawaii; and, if you answer that you have, state definitely at what time, when you came and when you departed.

2. Has the plaintiff corporation any place of business or any officers or agents within the Territory of Hawaii; or has it had at any time during the periods named in the complaint? If you answer that it has, state when, where such officers or agents were, and during what periods they were within the Territory, and where in said Territory.

3. In your answers to direct interrogatories 5, 6 and 7, please state what your personal knowledge is as to each of the facts
521 inquired for, and not that derived from supposition or hearsay.

(Signed)

JNO. W. CATHCART,

(Signed)

CASTLE & WITHINGTON.

Attorneys for Defendants.

(Signed)

SMITH & LEWIS,

Attorneys for D'ft. Executors

Waterhouse Estate & A. B. Wood.

Endorsed: Law No. 6023. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Trustee, et al. Defendants. Cross Interrogatories Propounded by the Defendants to Columbus Bierce. Filed August 29th, 1907 at 3:10 o'clock P. M. L. P. Scott, Clerk. Castle & Withington, Attorneys for Defendants.

522 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

L. 6023.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Direct Interrogatories Propounded by Plaintiff to E. W. Holden.

1. State your name and residence?
2. What, if any, connection have you with the corporation, William W. Bierce, Limited?
3. How long have you been so connected?
4. Do you know what property was involved in an action of replevin tried in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in which William W. Bierce, Limited, was plaintiff, and Clinton J. Hutchins, Trustee, was defendant, in which a judgment was entered in favor of the plaintiff on March 19, 1904?
5. State whether said property, or any portion thereof, has, since the entry of said judgment, been delivered to the plaintiff?
- 523 6. State whether the value of said property, or any portion thereof, has, since the entry of said judgment, been paid to the plaintiff?
7. State whether or not the amount of the damages for the detention of said property, as awarded in and by said judgment have been paid to the plaintiff?

Endorsed: Circuit Court, First Circuit, Territory of Hawaii. William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee, et al. Direct Interrogatories Propounded by Plaintiff to E. W. Holden. Filed August 31, 1907, at 10:35 o'clock A. M. J. A. Thompson, Clerk.

524 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

L. 6023.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Cross-Interrogatories Propounded by the Defendants to E. W. Holden.

1. State your place of residence, and whether at any time you have been within the Territory of Hawaii; and, if you answer that you have, state definitely at what time, when you came and when you departed.

2. Has the plaintiff corporation any place of business or any officers or agents within the Territory of Hawaii; or has it had at any time during the periods named in the complaint? If you answer that it has, state when, where such officers or agents were, and during what periods they were within the Territory, and where in said Territory.

3. In your answers to direct interrogatories 5, 6 and 7, please state what your personal knowledge is as to each of the facts
525 inquired for, and not that derived from supposition or hearsay.

(Signed)

JNO. W. CATHCART,

(Signed)

CASTLE & WITHINGTON,

(Signed)

SMITH & LEWIS,

Attorneys for Def't Waterhouse Est. and Wood,

Attorneys for Defendants.

Endorsed: Law No. 6023. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. William W. Bierce, Ltd. Plaintiff, vs. Clinton J. Hutchins, Trustee, et al. Defendants. Cross-Interrogatories Propounded by the Defendants to E. W. Holden. Filed August 29th, 1907 at 3:10 o'clock P. M. L. P. Scott, Clerk. Castle & Withington, Attorneys for Defendants.

(Endorsement on the Back of the Foregoing.)

Number 6023. Law Division, Circuit Court, First Circuit, William W. Bierce, Limited, v. Clinton J. Hutchins, Trustee, et al. 1907. Commission to take Testimony issued to William G. Wise, Esq. and Direct and Cross Interrogatories to be propounded to Columbus Bierce and E. W. Holden. Entered in Docket Vol. —, Page —. Recor-ed, Vol. —, Page —. — — —, Clerk.

526 The depositions of Columbus Bierce, Esq., and E. W. Holden, Esq., of New Orleans, in the State of Louisiana, witnesses of lawful age, produced, sworn and examined on their respective corporeal oaths on the 8th day of October, in the year of our Lord, A. D. 1907, at the office of William G. Wise, 100 Washington Street, in the City of Chicago, County of Cook and State of Illinois, by me, William G. Wise, a commissioner duly appointed by a commission issued out of the Clerk's Office of the Circuit Court of the First Circuit, Territory of Hawaii, bearing teste in the name of J. M. Thompson, Esq., Clerk of the said Circuit Court of the First Circuit, Territory of Hawaii, with the seal of said Court affixed thereto and to me directed as such commissioner for the examination of the said Columbus Bierce, Esq., and E. W. Holden, Esq., witnesses in a certain suit and matter in controversy now pending and undetermined in the said Circuit Court of the First Circuit, Territory of Hawaii, wherein William W. Bierce, Limited, is plaintiff, and Clinton J. Hutchins, Trustee, Arthur B. Wood and William Waterhouse and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, are defendants, in behalf of the said plaintiff as well upon the cross interrogatories of the defendants as on the interrogatories of the plaintiff, which are attached to the said commission and upon none others.

The said COLUMBUS BIERCE, Esq., being first duly sworn by me as a witness to said cause previous to the commencement of his examination to testify the truth as well on the part of the plaintiff as the defendants in relation to the matters in controversy between the said plaintiff and defendants so far as he should be interrogated, testified and deposed as follows:

527 Interrogatory Number 1. State your name and residence?

Answer to Interrogatory Number 1. My name is Columbus Bierce, my residence is New Orleans, Louisiana.

Interrogatory Number 2. What, if any, connection have you with the corporation, William W. Bierce, Limited?

Answer to Interrogatory Number 2. I am Vice President, stockholder and director of the corporation William W. Bierce, Limited, and as such Vice President have been in active charge of all its business and affairs since its organization.

Interrogatory Number 3. How long have you been so connected?

Answer to Interrogatory Number 3. I have been so connected since the organization of the corporation in 1899.

Interrogatory Number 4. Do you know what property was involved in an action of replevin tried in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in which William W. Bierce, Limited, was plaintiff, and Clinton J. Hutchins, Trustee, was defendant, in which a judgment was entered in favor of the plaintiff on March 19, 1904?

Answer to Interrogatory Number 4. Yes, sir.

Interrogatory Number 5. State whether said property, or any por-

tion thereof, has, since the entry of said judgment, been delivered to the plaintiff?

Answer to Interrogatory Number 5. Said property has not, nor has any portion of it, been delivered to William W. Bierce, Limited, the plaintiff, since the entry of said judgment.

Interrogatory Number 6. State whether the value of said property, or any portion thereof, has, since the entry of said judgment, been paid to the plaintiff?

Answer to Interrogatory Number 6. Neither the value of said property, nor any portion thereof, has been paid to William W. Bierce, Limited, the plaintiff, since the entry of said judgment.

Interrogatory Number 7. State whether or not the amount of the damages for the detention of said property, as awarded in and by said judgment, have been paid to the plaintiff?

Answer to Interrogatory Number 7. The amount of the damages for the detention of said property as awarded in and by said judgment, namely, One Thousand and Forty-five Dollars (\$1045.00), was paid to Messrs. Kinney, McClanahan and Cooper, the local attorneys at Honolulu for William W. Bierce, Limited, in the month of April, 1904.

Cross Interrogatories and Answers Thereto by Witness on the Part of the Defendants.

Cross Interrogatory Number 1. State your place of residence, and whether at any time you have been within the Territory of Hawaii; and, if you answer that you have, state definitely at what time, when you came and when you departed.

Answer to Cross Interrogatory Number 1. My residence is New Orleans, Louisiana, I have never been in the Territory of Hawaii.

Cross Interrogatory Number 2. Has the plaintiff corporation any place of business or any officers or agents within the Territory of Hawaii; or has it had at any time during the periods named in the complaint? If you answer that it has, state when, where such officers or agents were, and during what periods they were within the Territory, and where in said Territory.

Answer to Cross Interrogatory Number 2. William W. Bierce, Limited, the plaintiff corporation, has no place of business nor any officer nor agent, within the Territory of Hawaii, and it has not had at any time during the periods named in the complaint, except as to the law firm of Kinney & McClanahan, composed, as I understand, of Messrs. W. A. Kinney, E. B. McClanahan and S. H. Derby, which was later changed by the admission of Judge Cooper, whereupon the firm name became Kinney, McClanahan & Cooper. These firms acted at the times mentioned in the complaint as the counsel and attorneys at law for plaintiff, William W. Bierce, Limited, and in the Fall of 1904 Judge Clinton A. Galbraith became associated with them as of counsel for plaintiff and remained such counsel until about the month of April, 1905, when his relations with the plaintiff corporation were terminated. The firm of Kinney, McClanahan & Cooper continued to act as attorneys at law for the plaintiff corpora-

tion until about the middle of November, 1905, when all relations between them and the plaintiff corporation, William W. Bierce, Limited, were terminated; since which time Mr. A. G. M. Robertson, of Honolulu, has been the only representative of the plaintiff corporation within the Territory of Hawaii. While acting as such counsel for the plaintiff, Judge Galbraith was in Honolulu, Island of Oahu, and the firms of Kinney & McClanahan and Kinney, McClanahan & Cooper, while acting as such counsel and attorneys were also engaged in practice at the same place and resided there. The authority of the agents named in this answer was limited to the duty of prosecuting the replevin suit in which the judgment referred to

was rendered and in protecting that judgment in the Supreme
530 Court of the Territory of Hawaii, as the attorneys at law and counsel of the plaintiff corporation, William W. Bierce, Limited, and they were authorized as such attorneys to demand the possession of, and take possession of, the property in question for and in behalf of William W. Bierce, Limited, or failing so to do, to obtain payment in full of the value thereof, as well as all damages for the detention thereof and costs of suit awarded to the plaintiff by said judgment.

Cross Interrogatory Number 3. In your answers to direct interrogatories 5, 6 and 7, please state what your personal knowledge is as to each of the facts inquired for, and not that derived from supposition or hearsay.

Answer to Cross Interrogatory Number 3. As Vice President of William W. Bierce, Limited, in active charge of all its business and affairs, I know of my own personal knowledge that the said property has not been delivered, nor has any portion of it been delivered, to William W. Bierce, Limited, nor has the value thereof, nor any portion thereof, been paid to William W. Bierce, Limited, but the amount of the damages for the detention of said property as awarded by said judgment has been paid. As Vice President of the plaintiff corporation, William W. Bierce, Limited, in active charge of the management of the business and affairs of the corporation, I have personally and actively had charge of and directed all efforts made by said corporation, both before and since the commencement of the litigation resulting in said judgment, to recover the possession of said property, or the value thereof, and have personally directed the conduct of all the attorneys and counsel acting for the company in

the prosecution of said litigation and in taking all the steps
531 which have been taken looking to such recovery. In the same capacity I have also actively had charge of the books of account of the company, which have been kept under my immediate direction and which I know to be correct and true, and which show no payment made to the company on account of the value of said property and show no part of the property returned to William W. Bierce, Limited. I have at all times since the entry of said judgment and now have correct personal knowledge of the amount, character, value and location of all property in the possession of the company, and of the amounts and location, or places of deposit, of all funds in its possession. I also know that continuously since the entering of

said judgment on March 19, 1904, down to the present time, the judgment defendant, Clinton J. Hutchins, Trustee, has waged an aggressive fight against us in the courts in endeavoring to have said judgment reversed or in some way nullified, first by taking up the case on bill of exceptions to the Supreme Court of the Territory of Hawaii, by which the case was heard and the judgment reversed, and later by contesting the appeal of William W. Bierce, Limited, to the Supreme Court of the United States in the same case, by which the decision or decree of the Supreme Court of the Territory was on April 8th, 1907, reversed, and the cause remanded to the latter court with directions to proceed therein in conformity with the opinion of the Supreme Court of the United States, and he is now trying to induce the Territorial Supreme Court to evade, or to proceed contrary to, the mandate and opinion of the Supreme Court of the United States in that case, and in open defiance thereof, in order to nullify said judgment; and that he has been and is represented in all

532

of said proceedings and attempts by John W. Cathcart and Castle & Withington as his attorneys at law.
(Signed) COLUMBUS BIERCE.

STATE OF ILLINOIS,

County of Cook, ss:

Subscribed and sworn to before me this 8th day of October, A. D. 1907.

(Signed)

WILLIAM G. WISE,
Commissioner.

533

And the said E. W. HOLDEN, Esq., being first duly sworn by me as a witness to said cause previous to the commencement of his examination to testify the truth as well on the part of the plaintiff as the defendants in relation to the matters in controversy between the said plaintiff and defendants, so far as he should be interrogated, testified and deposed as follows:

Interrogatory Number 1. State your name and residence?

Answer to Interrogatory Number 1. My name is E. W. Holden, and residence New Orleans, Louisiana.

Interrogatory Number 2. What, if any, connection have you with the corporation, William W. Bierce, Limited?

Answer to Interrogatory Number 2. Secretary-Treasurer—Director and Stockholder.

Interrogatory Number 3. How long have you been so connected?

Answer to Interrogatory Number 3. Stockholder since the organization in 1899 and Secretary-Treasurer since September, 1903. As such officer I have been actively engaged in the management and carrying on of the business of the company since September 1903.

Interrogatory Number 4. Do you know what property was involved in an action of replevin tried in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in which William W. Bierce, Limited, was plaintiff, and Clinton J. Hutchins, Trustee,

was defendant, in which a judgment was entered in favor of the plaintiff on March 19, 1904?

Answer to Interrogatory Number 4. Yes.

Interrogatory Number 5. State whether said property, or any portion thereof, has, since the entry of said judgment, been delivered to the plaintiff?

534 Answer to Interrogatory 5. No.

Interrogatory Number 6. State whether the value of said property, or any portion thereof, has, since the entry of said judgment, been paid to the plaintiff?

Answer to Interrogatory Number 6. No.

Interrogatory Number 7. State whether or not the amount of the damages for the detention of said property, as awarded in and by said judgment have been paid to the plaintiff?

Answer to Interrogatory 7. Yes, damages to the amount of One Thousand and Forty-five Dollars have been paid.

Cross Interrogatories and Answers Thereto by Witness on the Part of the Defendants.

Cross Interrogatory Number 1. State your place of residence, and whether at any time you have been within the Territory of Hawaii; and, if you answer that you have, state definitely at what time, when you came and when you departed.

Answer to Cross Interrogatory Number 1. My place of residence is New Orleans, Louisiana, and I have never been within the Territory of Hawaii.

Cross Interrogatory Number 2. Has the plaintiff corporation any place of business or any officers or agents within the Territory of Hawaii; or has it had at any time during the periods named in the complaint? If you answer that it has, state when, where such officers or agents were, and during what periods they were within the Territory, and where in said Territory.

Answer to Cross Interrogatory Number 2. No, the corporation of William W. Bierce, Limited, has no place of business or agents within the Territory of Hawaii nor has it had at any time during the periods named in the complaint, other than its attorneys
535 at law, residing at Honolulu.

Cross Interrogatory Number 3. In your answers to direct interrogatories 5, 6 and 7, please state what your personal knowledge is as to each of the facts inquired for, and not that derived from supposition or hearsay.

Answer to Cross Interrogatory Number 3. In my answers to direct interrogatories 5, 6 and 7, I have stated what my personal knowledge is as to each of the facts inquired for, and not knowledge derived from supposition or hearsay. My means of knowledge concerning the matters about which I have testified in answering said interrogatories are my active personal connection with the management of the business of William W. Bierce, Limited, including

the efforts which have been constantly made by it to recover the possession of said property or the value thereof in money.

(Signed)

E. W. HOLDEN.

STATE OF ILLINOIS,

County of Cook, ss:

Subscribed and sworn to before me this 8th day of October, A. D. 1907.

(Signed)

WILLIAM G. WISE,

Commissioner.

I, William G. Wise, of the City of Chicago, County of Cook and State of Illinois, a commissioner duly appointed to take the depositions of the said Columbus Bierce and E. W. Holden, the witnesses whose names are subscribed to the foregoing depositions, do hereby certify that previous to the commencement of the examination of the said Columbus Bierce and E. W. Holden, as
536 witnesses in the suit between the said William W. Bierce, Limited, plaintiff, and the said Clinton J. Hutchins, Trustee, Arthur B. Wood and William Waterhouse and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, defendants, they and each of them were duly sworn by me as such commissioner to testify the truth in relation to the matters in controversy between the said plaintiff and the said defendants, so far as they should be interrogated concerning the same; that the said depositions were taken at my office at 100 Washington Street, in the City of Chicago, County of Cook, and State of Illinois, on the 8th day of October, A. D. 1907; that after said depositions were taken by me as aforesaid, the interrogatories and answers thereto as written down were read over to the said witnesses; and that thereupon the same were signed and sworn to by the said deponents before me as such commissioner at the place and on the day and year last aforesaid.

Commissioner's fees \$15.00 paid by plaintiff.

(Signed)

WILLIAM G. WISE,

Commissioner.

Endorsed: No. 6023. Law Division. In the Circuit Court of the First Circuit, Territory of Hawaii. Wm. W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee, et al. Depositions of Columbus Bierce and E. W. Holden taken before William G. Wise, Commissioner. Returned & Filed October 23, 1907, at — o'clock — m. J. A. Thompson, Clerk.

537 (Endorsements on the Front of Envelope.)

SCHMITT & WISE
Attorneys at Law
100 Washington Street
Chicago.

Stamp 10c

Stamp 10c

No. 6023 Law Division
In the Circuit Court of the First
Circuit, Territory of Hawaii.
William W. Bierce, Limited
vs.
Clinton J. Hutchins, Trustee, et al.
Depositions of Columbus
Bierce and E. W. Holden

73115

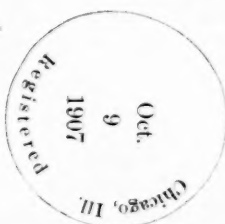
25947

To J. A. Thompson,
Clerk of Circuit Court
Honolulu,
Territory of Hawaii.

Received per registered mail on
October 23, 1907.

(Sig.) J. A. Thompson,
Clerk.

Opened at the request of A. G. M.
Robertson counsel for the plaintiff
on Oct. 24, 1907 at 10:5 A. M.
(Sig.) J. A. Thompson,
Clerk.



(Endorsements on the Back of Envelope.)

William G. Wise
Commissioner

William G. Wise
Commissioner

Law No. 6023
Plaintiff's Exhibit FF.
Filed May 11, 1908.
Job Batchelor,
Clerk.

William G. Wise
Commissioner

538 Interest on \$22,000, amount of damages awarded plaintiff in the case of William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee, from April 15, 1904, date of issuance of exception, to date (May 11, 1908), at 6% (four years and twenty five days).

Amount of damages	\$22,000.	
Interest for 4 yrs. at 6% on \$22,000.....	5,280.	
“ “ 25 days “	91.65	
		<hr/> 5,371.65
		<hr/> \$27,371.65

Interest on Judgment for Costs per Order of Court Filed Sept. 27, 1907.

U. S. Supreme Court.....	\$518.57	
Territorial Supreme Court	230.00	
		<hr/> 748.57
7 Months and 10 days at 8% (from Sept. 27, 1907, to May 7, 1908)		36.52
		<hr/> \$785.09
		<hr/> \$28,156.74

Endorsed: Law No. 6023. Plaintiff's Exhibit GG. Filed May 11, 1908. Job Batchelor, Clerk.

539 “Know all men by these presents that I, Clinton J. Hutchins, acting both individually and as trustee, of Honolulu, Territory of Hawaii, in consideration of the sum of ten dollars, to me paid by Francis B. McStocker, of said Honolulu, the receipt whereof is hereby acknowledged, and in further consideration of the undertaking by said Francis B. McStocker to organize a corporation to take over certain lands, leases and property now owned by the Kailua Sugar Co., a California corporation, and by myself, said property being situate in the district of North Kona, Island of Hawaii, and being part of the property conveyed to me by F. L. Dorth, receiver of the Kona Sugar Co., Ltd., by deed dated June 13th, 1903, I do hereby give, grant, bargain, sell, convey, assign, set over and deliver unto the said Francis B. McStocker all of the following lands, leases and leaseholds therein described, personal property roads and franchises, viz:

“One. Lease from Queen Kapiolani to A. Fernandez and Frank Gouveia dated September 14th, 1892, for fifteen years, of the lands of Waiaha I and Kahului II, situate at North Kona, Island of Hawaii, and being recorded in the Registry of Deeds at Honolulu in Book 144 on page 269.

“Two. That certain lease from said Kapiolani to J. Coerper of lands in the ahupuaas of Waiaha I and Kahului II, dated April 13th, 1895, for thirteen years with the privilege of extension for

seventeen years more, and recorded in said Registry of Deeds in Book 156 on pages 29 and 30.

"Three. That certain confirmation by the Kapiolani Estate, Ltd., of said last named lease, dated January 31st, 1901.

"Four. All of that certain sugar mill, buildings, machinery, equipment, shops, tools, implements and appurtenances on, upon, about, or connected with or incidental to, the sugar manufacturing plant lately belonging to the Kona Sugar Co., Ltd., and sold
540 to me as aforesaid by said F. L. Dortch, receiver as aforesaid.

"Five. All other lands, leases and leaseholds, personal property, rights, easements, privileges and appurtenances conveyed to me or intended so to be by the said F. L. Dortch, receiver as aforesaid, by the said deed aforesaid, and not heretofore assigned by me to C. J. Falk or heretofore sold or assigned by me to J. R. Sloan by deed dated February the first, 1904.

"To have and to hold the said described property, together with all the rights, easements, privileges and appurtenances thereunto or to any part thereof belonging, unto the said Francis B. McStocker, his heirs, executors, administrators and assigns, to their sole use and benefit and behoof forever.

"And I, the said Clinton J. Hutchins, both individually and as trustee, do hereby, for myself and my representatives and assigns, covenant with the said Francis B. McStocker, his heirs, executors, administrators and assigns, that I will forthwith cancel and cause to be cancelled by the Kailua Sugar Co. that certain agency agreement between the Kailua Sugar Co. and C. J. Hutchins and that certain planting and grinding agreement between the said Kailua Sugar Co. and Clinton J. Hutchins, both of said agreements being dated February the 14th, 1904; that I am lawfully seized in fee of said property, other than said leases and said leaseholds; that I have good right to sell, convey, assign and deliver all of said described property as aforesaid; that the same are free from all incumbrances and that I am and my heirs, executors, administrators and assigns, warrant and defend the said property and each and every part thereof unto the said Francis B. McStocker, his heirs, executors, administrators and assigns, against the claims and demands of all persons.

"In witness whereof I have hereunto set my hand and seal this 7th day of November, A. D. 1905.

CLINTON J. HUTCHINS, *Trustee*.
CLINTON J. HUTCHINS."

541 STATE OF LOUISIANA,

Parish of Orleans, City of New Orleans:

Be it known, that on this second day of December in the year [nineteen hundred and] * One thousand, eight hundred and ninety nine, before me, Jefferson Charles Wenck, a Notary Public, in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned: Personally came and appeared, the persons whose

[* Words enclosed in brackets erased in copy.]

names are hereunto subscribed, all above the full age of majority; who severally declared that availing themselves of the provisions of an act of the Legislature of this State, known as Act No. 36 of the session of 1888, as well as of those of the general laws of this State relative to the organization of corporations, they have formed and organized, and by these presents do form themselves into and constitute a quorum for the objects and purposes and under the stipulations and agreements hereinafter set forth and expressed, which they hereby adopt as their charter, to wit:

Article I.

The name and title of this corporation shall be William W. Bierce "Limited". Its domicile shall be in the City of New Orleans, State of Louisiana, and it shall have and enjoy succession under its corporate name for a period of Ninety-nine years from and after the date hereof.

542 Said corporation shall have power and authority to contract, sue and be sued in its corporate name; to make and use a corporate seal, and the same to break or alter at pleasure; to hold receive, lease, hire, purchase sell and convey, as well, as to mortgage and hypothecate under its corporate name, both real and personal property; to borrow and lend money, issue bonds and notes, give and receive securities therefor, with power to sell pledge or otherwise dispose of same; name and appoint such managers, directors, officers, overseers and agents as the interest and convenience of said corporation may require; to make and establish such by-laws, rules and regulations for said corporation as may be necessary and proper, and the same to alter, and amend at pleasure.

Article II.

The objects and purposes for which this corporation is organized, and the nature of the business to be carried on by it, are hereby declared to be—the acquisition of the business, property and good will of the Commercial firm of William W. Bierce, situated in the City of New Orleans and elsewhere, including all the patents now owned by them or in which they are interested, and to continue and conduct a similar business; and in connection therewith to conduct the business of general contractors and manufacturers and of furnishers of construction material; to act as Manufacturers' agents and representatives, and generally in reference to the foregoing to do such things and engage in such pursuits as may pertain thereto, or enure to the benefit of this corporation.

All citations shall be made upon the President of this corporation, and in his absence, the Vice-President thereof.

Article III.

543 The capital stock of this corporation is hereby fixed at the sum of three hundred thousand (\$300,000) dollars, divided into and represented by three thousand (3000) shares of the par value of one hundred (\$100) dollars each, which capital

stock may be increased or reduced at a meeting called for said purpose as the law provides. The payment of said stock shall be made in cash at such times, in such amounts and upon such notice as may be prescribed by the Board of Directors, who shall also have power to issue full paid stock in payment of property, either real or personal transferred to this corporation, or for labor done for it, at such times and in such manner as may be determined by the Board of Directors. This corporation shall become a going concern as soon as Five thousand dollars of the capital stock shall have been subscribed for.

Article IV.

All the corporate powers of this corporation shall be vested in a Board of Directors, to be composed of Three persons, each of whom shall be a stockholder of record in his own right, to be elected hereafter on the day herein set forth, except the first, which is herein-after provided for.

The election of the Board of Directors shall be held on the second Tuesday of January of each year, beginning in the year 1901; which Board shall have power to make all needful rules and by-laws for the government and regulation of the Company and of its officers, agents and employés, and to conduct the same, and to appoint subordinate officers and agents necessary to that end.

The elections shall be held at the office of the Company under the supervision of two Commissioners, to be appointed by the Board of Directors. Ten days' notice of such meeting shall be given by the

544 Secretary in writing to each stockholder, at his last known residence; and the Directors then elected shall serve until their successors are elected and qualified. A majority of the votes cast shall elect, and one vote shall be allowed for each share of stock represented by the holder, in person or by proxy.

Any vacancy occurring in said Board from any cause whatsoever shall be filled by the remaining Directors, and a majority of the Directors shall constitute a quorum for the transaction of business. The Board of Directors shall, at their first meeting in each year, elect out of their number a President, and a Vice-President, and also elect a Secretary-Treasurer, who need not be a Director or stockholder, and from time — appoint such other officers, clerks, overseers and agents as may be deemed necessary for the purpose and business of said corporation, and dismiss the same at pleasure.

The following named persons, to wit: William W. Bierce, Columbus Bierce and Charles F. Pierce, shall be and are hereby constituted for the first Board of Directors, with the said William W. Bierce, as President, Columbus Bierce, as Vice-President and Charles F. Pierce, as Secretary-Treasurer, and who shall hold their offices until the second Tuesday of January, 1901, or until their successors are duly elected and shall have qualified and taken their seats.

Any Director may, in writing, appoint, and at his pleasure revoke, a proxy to act for and represent him in his absence at meetings of the Board.

Article V.

Whenever this corporation is dissolved, either by limitation or from any cause, its affairs shall be liquidated under the supervision of two Liquidating Commissioners to be appointed for that purpose [from]* among the stockholders at an election held for that
545 purpose, after ten days' prior notice by the Secretary in writing to each stockholder, at his last known residence, and upon the assent of a majority of the capital stock of said corporation.

Said Commissioners shall remain in office until after the affairs of said corporation shall have been duly liquidated, and in the event of the death of one of the liquidators, the survivor shall continue to act.

Article VI.

This act of incorporation may be changed, altered or amended, or this corporation may be dissolved with the assent of Three-fourths of the stock represented at a meeting for the purpose, after ten days' written notice to each stockholder directed to his last residence.

Article VII.

No stockholder of this corporation shall ever be held liable or responsible for the contracts or faults thereof, in any further sum than the unpaid balance due to the Company on the shares owned by him, nor shall any mere informality in organization have the effect of rendering this charter null, or of exposing a stockholder to any liability beyond the amount of his stock.

Thus done and passed in my Notarial Office at the City of New Orleans aforesaid, in the presence of Charles J. Herr and Sam Henderson, Jr., Competent witnesses of lawful age and residing in this City, who hereunto subscribe their names together with said appearers and me Notary on the day and date set forth in the caption hereof.

Original Signed.

Wm. W. Bierce, Twenty (20) shares.
Columbus Bierce, Twenty (20) shares.
Chas. F. Pierce, Ten (10) shares.

CHAS. J. HERR.

SAM HENDERSON, Jr.

JEFF C. WENCK, *Not. Pub.*

546 I, the undersigned Recorder of Mortgages in and for the parish of Orleans, State of Louisiana, do hereby certify that the above and foregoing act of Incorporation of William W. Bierce "Limited" was this day duly recorded in this Office in Book 646 folio 700.

New Orleans, December 22nd, 1899.

[SEAL.]

(Signed)

GEO. GUINAULT, *D'y R. M.*

[* Words enclosed in brackets erased in copy.]

I, the undersigned Notary do hereby certify that the above and foregoing is a true and correct copy of the original act of "William W. Bierce "Limited" otgether with the certificate of the Recorder of Mortgages thereunto appended, on file and of record in my Office.

In faith whereof, I hereunto set my hand and seal this 22nd day of July, A. D. 1903.

[SEAL.] (Signed) JEFF C. WENCK, *Not. Pub.*

Indorsement: New Orleans Dec. 2nd, 1899. Act of Incorporation of William W. Bierce "Limited." Recorded Mortgage Office Book 646 fo. 700 Jefferson C. Wenck, (Successor to John Bendernagel) Notary Public, 301 & 302 Cora Building, 818 Common Street, New Orleans, La.

547 UNITED STATES OF AMERICA,
State of Louisiana:

Civil District Court for the Parish of Orleans.

I, John St. Paul, Presiding Judge of the Civil District Court for the Parish of Orleans, a Court of Record, having jurisdiction, do hereby certify, That Jefferson C. Wenck is a duly commissioned and qualified Notary Public for the Parish of Orleans, State of Louisiana, resident in the City of New Orleans; that the attestation of said Notary Public to the document hereunto annexed is in due form and that the signature of said Notary Public appended to said attestation is true and genuine.

Given under my hand at the City of New Orleans, on the Twenty-seventh day of July in the year of our Lord, one thousand nine hundred and three (1903) and in the 128th year of the Independence of the United States of America.

(Signed) JOHN ST. PAUL, *Judge.*

I, Thomas Connell, Clerk of the Civil District Court for Parish of Orleans, do hereby certify that John St. Paul, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding Judge of the Civil District

548 Court for the Parish of Orleans, duly appointed and commissioned and qualified as such, and that said attestation is in due form of law.

Witness my hand and the seal of said Court, this Twenty-seventh (27) day of July 1903.

[SEAL.] (Signed) T. CONNELL, *Clerk.*

Indorsements: Civil District Court Jun- 29 1903 Thomas Connell, Clerk. Paid 1.00 L. 5782 Exhibit "AA" for Identification. Wm. W. Bierce, Ltd., v. C. J. Hutchins, Trustee. Filed March 8th, 1904 by Mr. McClanahan, P. D. Kellett, Jr., Clerk. Law No. 6023 Plaintiff's Exhibit I. I. Filed May 12, 1908. Job Bachelor, Clerk.

549 Stamped \$52.

This indenture, made this thirteenth day of June, 1903, by and between F. L. Dortch, Receiver Kona Sugar Company, Limited, the party of the one part, and Clinton J. Hutchins, Trustee, of Honolulu, T. H. the party of the other part.

Witnesseth. That Whereas, by an order issued in the matter of "M. W. McChesney & Sons vs. Kona Sugar Company, Limited, et al.," pending in the Third Circuit Court of the Territory of Hawaii, by Hon. W. S. Edings, Judge of said Court, the said F. L. Dortch, Receiver as aforesaid, was directed to sell at public auction to the highest bidder, all and singular the property and effects of the said defendant corporation, the Kona Sugar Company, Limited, and

Whereas, in accordance with said order and direction the said Receiver did offer the said property of the Kona Sugar Company, Ltd. at such public auction at 12 o'clock noon on the 9th day of May, 1903, at the front door of the Court House at Kailua, Hawaii, such being the time and place named in said order for said sale, and

Whereas, the said Clinton J. Hutchins offered the highest and best bid for said property at said sale, to wit, the sum of \$12,250.00 and

Whereas, by an order and decree made and entered by the said Hon. W. S. Edings on the first day of June, 1903, the said sale and bid were confirmed, and the said Receiver ordered and directed to execute and deliver to said purchaser any and all instruments in writing necessary to effectually convey to said purchaser the said property and effects of the said Kona Sugar Company, Ltd.

Now therefore, I, F. L. Dortch, Receiver of the Kona
550 Sugar Company, Limited, by virtue of the authority and direction in said order contained, and for and in consideration of the said sum of Twelve Thousand Two Hundred and Fifty Dollars (\$12,250.00) to me in hand paid, the receipt of which is hereby acknowledged, and as Receiver of said Company, do by these presents, give, grant, bargain, sell, convey, assign and set over unto the said purchaser, the said Clinton J. Hutchins, Trustee, his successors and assigns, all the right, title and interest of the said Kona Sugar Company, Limited, in and to all and singular the goods, chattels, effects and property, real, personal and mixed of the said Company, that is to say, all of the lands, tenements and hereditaments, all easements, railroad, railroad equipment, locomotives, flat cars, cane cars, sugar mill and equipment, cane conveyors, buildings, implements, wagons, vehicles, growing crops, livestock, choses in action, franchise and all rights and privileges of said Company, and the good will of the same, conveying hereby all and every right, title and interest which the said Company may have in and to every property and effects, whether the same be mentioned hereinbefore or not.

To have and to hold the said and all of the personal and fee simple property unto the said Clinton J. Hutchins, Trustee, his successors and assigns forever, and the said and all and every of the leasehold and other interests of the said Company for and during the terms of years remaining yet to run and unexpired thereon, subject

nevertheless, to the covenants and agreements in said leases contained on the part of said Company to be kept and performed.

In witness whereof, I have hereunto set my hand and seal
551 the day and year first above written.

F. L. DORTCH,
Receiver Kona Sugar Co., Ltd.

TERRITORY OF HAWAII,
Third Circuit, ss:

On this 13th day of June, 1903 appeared before me F. L. Dortch, personally known to me to be the Receiver of the Kona Sugar Company, Limited, and to be the person described in, and who executed the foregoing instrument who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein set forth.

GUY F. MAYDWELL, [SEAL.]
Notary Public, Third Circuit.

Recorded & Compared this 17th day of July, A. D. 1903, at 9:48 o'clock A. M.

THOS. G. THRUM,
Registrar of Conveyances.

Endorsed: Deed. F. L. Dortch, Receiver Kona Sugar Company, Limited, to Clinton J. Hutchins, Trustee. Dated June 13th, 1908. Recorded Liber 249 Page 369. Copy. Copy of deed received in evidence, William W. Bierce Limited vs. William Waterhouse, et al. as Exhibit JJ. O. K. A. G. M. Robertson, Plaintiff's Attorney.

552 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LTD., Plaintiff,
vs.
CLINTON J. HUTCHINS et al., etc., Defendants.

Index.

J. A. Thompson	2			
"	13			
Henry Smith	38	39	42	
Albert Waterhouse	43	48	48	58
F. B. McStocker	59			
J. A. Thompson (rec.)	67	70		
F. B. McStocker (rec.)	71			
Geo. C. Kupa	77			
J. M. McChesney	79	82	88	

For Defendants:

John W. Cathcart.....	97	111	126	128
M. F. Scott	130	145	188	194
E. E. Conant	195	199	206	
J. A. Thompson (rec.).....	214			
"	220			
Albert Waterhouse	244			
J. A. Thompson (rec.).....	246			
"	251			
R. W. Shingle	254			
J. L. Horner	258	263		
J. W. Cathcart (rec.).....	264			

In Rebuttal:

John D. Paris.....	269	271	
H. E. Cooper	275	289	322
" (rec.)	327		
J. A. Thompson (rec.).....	340		
H. E. Cooper (rec.).....	343		
Robert L. Colburn	350	353	356
John F. Colburn	357		
Frank Gerard	361	367	
R. W. Shingle (rec.).....	370	373	

553 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LTD., Plaintiff,
vs.
CLINTON J. HUTCHINS et al., etc., Defendants.

Transcript.

MAY 7, 1908.

(A jury is called, examined, accepted and sworn. Opening statement made, etc.)

Direction examination of J. A. THOMPSON, called and sworn.

Mr. PROUTY:

Q. Please state your name?

A. James A. Thompson.

Q. What is your occupation, Mr. Thompson?

554 Mr. LEWIS: If your Honor please, at this time I wish to object, in behalf of William Waterhouse and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, two of the defendants named in this cause, to this evidence of this witness and also to all evidence which may be hereafter introduced by the plaintiff in this cause, as it is now pending, in its form at present before this court, on the ground that

there is a misjoinder of parties-defendant in this, that Albert Waterhouse and William Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, defendants, are joined in this action as parties-defendant with Arthur B. Wood. This is the first ground. And, second, that they are also joined in this action with Clinton J. Hutchins, Trustee, as one of the defendants in this action.

(Argument.)

Mr. ROBERTSON: We informed the court the other day, when we were before the court, we intend to discontinue as to Clinton J. Hutchins, Trustee, and Arthur B. Wood, and now we discontinue as to Clinton J. Hutchins and Arthur B. Wood.

Mr. WITHINGTON: I have a request to make; that is, if this discontinuance be allowed at this time it be on the payment of costs. I wish to have at least that question reserved.

The COURT: I wouldn't like to pass on it——

Mr. PROUTY: In this we have a judgment already against Mr. Withington's client for some 800 odd dollars costs, which is unpaid and which we have been unable to collect.

Mr. WITHINGTON: You have 1100 and odd dollars of our money too, which perhaps you will pay back to us.

The COURT: I will settle this, gentlemen, at the proper time when it comes up. You have all made your rights known and I suppose the record will preserve them. I suppose it is now in order
555 for the court to direct that the case be dismissed as to Clinton J. Hutchins and Mr. Wood. It is so ordered.

Mr. WITHINGTON: Your Honor will reserve the question of costs?

The COURT: Certainly. Except as to the question of costs which the court will hear and determine later on a proper presentation of the matter. The case will proceed as to the Henry Waterhouse Estate, Albert and William Waterhouse, executors of the estate.

Mr. PROUTY: Yes.

Q. What is your occupation, Mr. Thompson?

A. Clerk of the Circuit Court of the First Circuit.

Q. How long have you been such a clerk?

Mr. LEWIS: One second. Let it appear of record that J. W. Cathcart and D. L. Withington of the firm of Castle & Withington, appear as counsel associated with our firm as representing the executors.

The COURT: So ordered; the record will show it.

Mr. PROUTY:

Q. How long have you been clerk in the Circuit Court, Mr. Thompson?

A. Since '95.

Q. 1895?

A. 1895, July.

Q. And are you also clerk of any other court in that connection?

A. I am also clerk of the Supreme Court.

Q. Of the Territory of Hawaii?

A. Of the Territory of Hawaii.

Q. And as such clerk have you the custody of the files and records?

A. I am one of the custodians of the records in the office. I am one of the custodians.

Q. Yes. Have you the plaintiff's complaint in the action of replevin entitled "William W. Bierce, Ltd., against Clinton J. Hutchins, Trustee"?

A. Yes sir, law number, law division——

Q. What is the number of the record?

A. Record 5782, Law Division. That is the first—That is the circuit court files.

Q. That is the original complaint?

A. Yes sir.

Q. Is it?

A. Yes sir.

Q. And have you also the term summons and sheriff's return of service in the same case, in the original papers?

A. Yes sir.

Q. And also the replevin affidavit by Mr. E. B. McClanahan?

A. Yes sir.

Q. And the plaintiff's order to the sheriff to seize the property mentioned in the affidavit and the return of the sheriff thereon?

A. Motion for issuance of execution.

Q. Well, that is a little further along. Perhaps I can help you, if you will give me Part I of the files.

A. That is Part II. Here is Part I here.

(Question read.)

A. I have that now.

Q. And have you also the plaintiff's replevin bond which was filed with the sheriff in that case, and the defendant's return or redelivery bond?

A. I didn't bring that along; it is still in the office.

Q. You haven't those bonds as yet with you?

A. No, not with me now; it is in the office.

Q. The other papers I referred to you have in your hand?

A. Yes sir.

Mr. PROUTY: I will offer in evidence—And there is also a stipulation filed with the clerk.

The COURT: The delivery bond and the redelivery bond, together with the stipulation.

The WITNESS: 1370 is the number——

Mr. PROUTY: Of the papers referred to by the witness I am offering first the complaint, the plaintiff's complaint in the replevin action, the complaint in the action entitled William W. Bierce, Ltd., vs. Clinton J. Hutchins, Trustee, No. 5782, in this court. The number is the number in this court; the action was brought in the circuit court of the third circuit and transferred to this court by stipulation.

(Reads.)

Exhibit "A," attached to said complaint, which I also offer in evidence is as follows: (Reads.)

Also Exhibit "B" attached to the complaint, which I also offer in evidence.

The COURT: I understand that the entire complaint is now in evidence? Very well, the entire complaint is in, and such other portions as you may designate and offer in evidence.

Mr. PROUTY: That's it. (Reads Exhibit "B".)

Mr. LEWIS: I want to have this understanding between counsel and the court. I want my rights protected, so no advantage will be taken of me and my clients. That is this, that either
558 Mr. Prouty reads, or that document is considered as read with the interlineations and all just as it appears,—just what is stricken out.

Mr. PROUTY: If your Honor please, I would object to that; I would object to any portion that is stricken out of the document being offered in evidence.

The COURT: No, I don't think that that is a part of the instrument. It has no existence, has it, so far as this case is concerned; whether or not it was properly stricken out a question may be reserved to the Supreme Court to pass upon, whether or not that was error in doing so.

(Argument)

The COURT: It saves time and I think it is apparent upon its face just what the amendment was. The document is in evidence. Of course if there is any question as to the propriety or the power of the court to make such order, it will be preserved upon the record.

Mr. PROUTY: That question, if your Honor pleases, is res judicata; it was passed upon.

The COURT: Proceed, Mr. Prouty. I think the——

Mr. CATHCART: Then the court will allow us an exception to the order of the court not requiring the entire document to be read in evidence as counsel——

The COURT: The court hasn't made any such order. The court has directed that the entire document be read. Any portion that has been erased has ceased to exist, as I understand it, for the purposes of this case. Whether the court made an order directing that portions be erased, I presume you have saved your rights at the time.

Mr. CATHCART: Not in this case; the defendants in this
559 case were never in that case. All I ask your Honor is to get the proper exception to the court's ruling that it is not necessary to read in evidence portions which lines are drawn through there.

The COURT: That is all right; very well, that is before the court. Exception will be allowed.

(Mr. Prouty continues reading)

Mr. PROUTY: I also offer in evidence the term summons, the return of service and entries thereon which are attached to said complaint (Reads)

I also offer in evidence the affidavits of E. B. McClanahan in said case, mentioned in the testimony of this witness, and which is subscribed and sworn to before Gussie H. Clark, notary public of the first judicial circuit, on July 20th, 1903, and the order on the

High Sheriff of the Territory of Hawaii, dated July 20th, 1903. by plaintiff's attorneys to seize the property in question, the return of the deputy sheriff thereon endorsed, and the endorsement on said papers showing the same to have been filed on August 1, 1903, at 7 o'clock A. M. by J. P. Curts, Clerk, on the replevin affidavit. The replevin affidavit is as follows:

(Reads)

Q. Mr. Thompson, have you now with you the replevin bond, that bond filed by the plaintiff, and redelivery bond executed by the defendant?

A. This is the bond and here is the return bond.

(The Clerk has marked them all under one Exhibit "A")

Q. The replevin bond and return bond which you have now produced are the original bonds filed?

A. Yes sir.

Q. In this case, are they?

560

A. Yes sir.

Mr. PROUTY: If your Honor please, I offer in evidence—And stipulation filed in this action on May 2nd 1908 between counsel for the parties.

The COURT: Any objection to being read in evidence? You may read it Mr. Prouty.

Mr. PROUTY: I would like to have the bonds offered in evidence first. The stipulation refers to the return bond, your Honor. I will offer also the return bond with the stipulation, and the replevin bond, those being the original bonds referred to by the witness.

Mr. LEWIS: The understanding is now that you are about to offer the return bond, redelivery bond?

Mr. PROUTY: Yes, I will offer the return bond and the replevin bond.

Mr. CATHCART: And the stipulation?

Mr. PROUTY: And the stipulation, yes.

Mr. LEWIS: I object to the admission in evidence of the return bond upon the following grounds: That there has been introduced in evidence the amended complaint in this action without the introduction of the original complaint in this action, such original complaint being in existence at the time the return bond was given and the amended complaint not being in existence at that time; that the return bond was given and delivered by the sureties at the time that the original complaint was given, together with the affidavit of E. B. McClanahan; the original complaint and the affidavit only being in existence at the time that the return bond was given.

(Argument)

The COURT: The bond named in the stipulation will be received in evidence. Objection overruled.

561 Mr. LEWIS: Take an exception.

(Here the court takes an adjournment until ten o'clock tomorrow morning.)

562 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LTD., Plaintiff,

vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, etc., Defendants.

MAY 8TH, 1908.

MR. CATHCART: In reference to that bond, it is going to take a few moments of argument. We want now to present that matter to the court and ask the court to reverse its order and strike out that bond.

THE COURT: I will re-open the matter for consideration.

MR. CATHCART: We are objecting now to the introduction of the offer of evidence made by the counsel for the plaintiff on the ground, of course, if the court pleases, that as the case now stands it is incompetent, irrelevant and immaterial. There has no proper foundation been laid for the introduction of these documents, and that during the progress of the argument counsel for the plaintiff called the court's attention to a stipulation which he claimed was a stipulation that this redelivery bond, not the replevin bond but the redelivery bond, could be admitted in evidence, stipulated that it should be received.

563 THE COURT: The order admitting it of course will be set aside temporarily.

(Exception by plaintiff.)

(Argument.)

THE COURT: The offer of the bond is consistent with the allegations of the complaint in this action. Objection overruled.

MR. LEWIS: We note an exception.

THE COURT: Let's see; the stipulation is offered as well?

MR. CATHCART: The court's ruling admits all; they were admitted all together.

MR. PROUTY: In order to preserve the proper order, then, I would like to read the replevin bond first, that is the plaintiff's bond, and they were all offered together, the replevin bond and the stipulation and the——

THE COURT: I only understood that you offered the stipulation and the redelivery bond.

MR. CATHCART: No, the offer to read was the replevin bond, the return bond and the stipulation, and that was the order in which he made the statement.

THE COURT: You have no objection to that?

MR. CATHCART: Well, under the court's ruling our objection is made as to that and the court's ruling admits them all in that form; we take an exception to that.

MR. LEWIS: May we have an exception of record?

THE COURT: The exception will be allowed and the record will show it.

MR. PROUTY: The replevin bond is as follows: (reads)

The stipulation is as follows: (reads)

The redelivery or return bond is as follows: (reads)

(The three documents marked Exhibit "B")

564 Direct examination of J. A. THOMPSON, recalled.

MR. PROUTY:

Q. Mr. Thompson, will you produce now the defendant's answer to the plaintiff's complaint in the replevin suit which was filed August 20th 1903, the plaintiff's motion for leave to amend its complaint—

A. I have the answer here.

Q. Yes; just wait until I have finished reciting these documents and then you can give the answer—All right, you have produced the answer?

A. I have the answer here, filed August 20th, 1903.

Q. And the motion to amend the complaint,—have you that also?

A. Motion to amend, filed March 4th 1904, motion and affidavit of Mr. McClanahan, motion to amend.

Q. They were both filed together, were they?

A. Bound together, yes.

Q. At the same time?

A. Yes sir.

Q. Have you produced there the stipulation for change of venue and the order entered thereon by the court, changing the venue of the replevin suit from the third circuit to the first circuit?

A. Yes sir, I have it here; filed December 16th 1903.

Q. Also please produce the defendant's bond for costs on
565 exceptions to the supreme court.

A. Bond for costs on motion for new trial?

Q. Yes.

A. Yes sir; filed March 21st 1904.

Q. I will modify my—That is the bond that I wish. What was the date of the approval of that bond?

A. The date of the approval by Judge De Bolt was March 21, 1904.

Q. Yes, that is the bond I want. And will you produce the findings of fact in the replevin suit and the conclusions of law the decision of the court, the circuit court, March 19, 1904, and the record of the judgment entered in that action on March 19th 1904. Those documents are all dated March 16th, 1904, I think.

A. Yes sir, the plaintiff's request for findings of fact and conclusions of law.

Q. Well, are those the findings as signed by the court?

A. Those are the findings as signed by the court and filed March 15th 1904.

Q. What date were they allowed?

A. Allowed on the 19th.

Q. March 19th?

A. 19th of March.

Q. Yes; have you there the conclusions of law?

A. The decision?

The COURT: The conclusions of law, the findings of law.

A. Yes sir.

Mr. PROUTY:

Q. On what date were they allowed?

A. That was signed also on the 19th of March 1904 and filed March 15th 1904.

566 Mr. ROBERTSON:

Q. They were signed by whom?

A. Judge J. T. De Bolt. Decision?

Mr. PROUTY:

Q. We want the decision and judgment.

A. Decision is dated March 19th 1904, signed by Judge J. T. De Bolt, filed March 19th 1904; judgment dated March 19th 1904, signed J. T. De Bolt, First Judge, and filed March 19th 1904.

Q. That is the original record judgment and findings?

A. Yes sir.

Q. Will you also produce the defendant's motion for a new trial and notice thereof. I think that is in Part II of the files.

A. Motion for new trial, dated March 19th 1904.

Q. What date was it filed?

A. Filed March 21st 1904.

Q. Now the bond you have referred to in your testimony was the defendant's bond which was filed with that motion, as I understand it; is that correct?

A. Taken on the motion for new trial.

Q. They were filed together?

A. I couldn't say; the filing date would show.

Q. Now doesn't the motion for new trial refer to a bond?

A. It does not.

Q. Well, was there any other bond filed on that date in that action than the one you have mentioned as defendant's bond on motion for new trial?

A. The motion does not refer to the bond but the bond refers to the motion. That is the only bond of that date, March 21.

567 Q. Yes; that is the only bond filed on that date was it?

A. That's all I find here.

Q. And that is the only motion for new trial filed?

A. That is the only—on the files here, yes.

Q. Will you also produce, Mr. Thompson, the order of the court dated March 23rd, 1904, sustaining plaintiff's objections to the sufficiency of bond tendered by defendant on motion for new trial, and ruling it to file a sufficient bond in a sum not less than the amount of the judgment on or about March 31st 1904.

A. Order of the court requiring defendant to file new delivery bond.

Q. You have produced that, have you?

A. I have it now.

Q. And also will you produce the notice and motion of plaintiff for an order requiring the defendant to file a new redelivery bond, or in default that execution issue on the judgment, and, accompanying that notice and motion, affidavits by E. B. McClanahan, John F. Colburn and Percy M. Pond, all of which were filed March 24th 1904.

A. The motion by plaintiff for an order requiring defendant to forthwith file in this cause a new redelivery bond, or failing in which, etc. I have the motion here and the notice, affidavit of Colburn, Percy M. Pond—

Q. Have you Mr. McClanahan's affidavit also there?

A. Yes sir.

Q. When were those papers filed?

A. Filed on the 24th of March 1904.

Q. Have you also there the order of March 28th 1904
568 ruling the defendant to file a new redelivery bond with two sufficient sureties, on or before April 2nd 1904?

A. Yes sir; it is dated March 28th—

Q. Yes?

A. —1904, but filed March 29th 1904.

Q. Have you also the order of April 2, 1904, extending defendant's time to file new redelivery bond as required by the order of March 28th 1904 until 9 o'clock A. M. on April 6th 1904, and also the affidavit of Clinton J. Hutchins filed April 2, 1904, on which I presume the order was based?

A. I think the—I think those are in the first part. Yes sir, order extending time for defendant to file new delivery bond, dated April 2, 1904, filed that same date.

Q. Have you the affidavit of Mr. Clinton J. Hutchins filed the same date?

A. Yes sir.

Q. Have you there the plaintiff's notice and motion dated April 6th 1904, the motion being an application to the court to order execution to issue on the judgment for non-compliance by defendant with the order of March 28th 1904 as extended by the order of April 2nd 1904?

A. I have it here.

Q. And have you the affidavit?

A. First is affidavit of P. D. Kellett, Jr., and E. B. McClanahan.

Q. Filed at the same time or on the same date?

A. Filed April 6th 1904.

Q. Have you also the order of April 8th 1904, ruling that execution issue on the judgment, according to its terms, unless defendant
569 deposited with the clerk of the court on or before 9 o'clock A. M. of Friday, April 15th 1904?

A. I have that order here.

Q. And bond in not less than double the amount of the judgment, the sureties to be approved by the court?

A. Yes sir. Order is dated April 8th 1904 and filed that same day.

Q. Mr. Thompson, will you also produce the execution issued on the judgment in this action of replevin?

A. I have it here.

Q. On what date was it issued?

A. Issued on the 15th of April 1904.

Q. Any hour particularly mentioned there, or just—the hour isn't mentioned, is it?

A. It is not mentioned here.

Q. And what is the date of the officer's return on that execution?

A. The return by the officer is dated May 23.

Q. What is the date?

A. Date of the return by the officer May 23rd 1904, and returned to the office here on the 27th of May 1904.

Q. That is the date of the file?

A. Returned to the office, yes, May 27th 1904.

Q. Will you produce the circuit court clerk's minutes of proceedings taken and orders entered in the replevin suit of the following dates: March 7th, 1904?

A. Yes sir.

Q. March 8th, March 9th, March 10th, 11th, 12th.

A. 11th.

Q. Yes?

A. 11th, 12th.

Q. 12th, 19th.

A. 19th.

570 Q. 23rd, 25th and 28th.

A. 23rd, 25th.

Q. Yes.

A. 28th of March 1904.

Q. And also the minutes of April 8th 1904.

A. Yes sir.

Mr. ROBERTSON:

Q. You have the minutes of all the dates Mr. Prouty has mentioned?

A. As mentioned by Mr. Prouty, yes sir.

Mr. PROUTY:

Q. Now all the papers and records that you have referred to in your testimony, as I understand it, are the original documents and court records in the replevin suit of William W. Bierce, Ltd., against Clinton J. Hutchins, Trustee?

A. Yes sir.

Q. In this court?

A. Yes sir.

Q. Have you with you the documents and records of the Supreme Court of the Territory in the same suit?

A. Yes sir, I have them.

Q. Will you produce the judgment of the supreme court of the Territory of May 6th, 1905, reversing the judgment of the court below.

A. I have it here, judgment filed May 6th 1905.

Q. By the way, what is the number of that case in the supreme court?

A. No. 265.

Q. Will you also produce the order of the Supreme Court of the United States allowing an appeal to that court. That order was dated December 4th, 1905.

571 A. Yes sir, I have it; dated December 4th 1905, order allowing appeal.

Q. Yes, and also the supersedeas order, motion and affidavit, of the Supreme Court of the United States.

A. I have it, the order.

Q. And attached to it is the printed motion and affidavit?

A. Printed motion for writ of supersedeas, yes sir.

Q. Also certified copy of the opinion of the Supreme Court of the United States?

A. Yes sir.

Q. Also the mandate of the Supreme Court of the United States, and cost bill?

A. Yes sir, I have it here.

Q. Covering costs in that court?

A. Yes sir.

Q. Have the judgment entered by the supreme court of the Territory of Hawaii for appellant's costs and vacating the judgment of that court entered May 6th 1905?

A. Dated September 27th 1907, an order of the supreme court, yes sir, dated September 27th 1907.

Q. Have you also the mandate of the supreme court of the Territory which was filed in the circuit court of the first circuit in the replevin suit?

A. Notice of decision, you mean?

Q. What?

A. Notice of deci-on on exceptions, notice to the lower court?

Q. Yes.

A. I have that here, original, and certified copy transmitted to the lower court, to the circuit court.

572 Q. Well, that certified copy is the one I want to offer in evidence, the one that was filed in the lower court.

A. I have that also here; I have the certified copy which was transmitted to the——

Q. The one that was filed in the circuit court?

A. In the circuit court, yes sir.

Q. Have you there the original record of the probate of the will of Henry Waterhouse, deceased, in the circuit court of the first circuit?

A. Yes sir, No. 3669, Probate Division, circuit court, first circuit.

Q. Will you produce in the matter of the estate of Henry Waterhouse deceased the original petition for the probate of the will, filed February 24th 1904, and the order for notice of hearing, which was dated February 24th 1904; affidavit of publication of time and place of proving will and codicil; letters testamentary, dated April

5th 1904, with copies of will and codicil attached, and proof, by affidavit or otherwise, whatever you have, of the publication of notice to creditors to prove their claims or file their claims against the estate of Henry Waterhouse deceased?

A. The original petition for probate of will, filed Feb. 24th 1904, order for notice of hearing, petition for probate of will, original order filed Feb. 24th 1904, affidavit of publication of time and place of proving will and codicil, filed April 4th 1904.

Q. Also produce the order of probate in that estate, Mr. Thompson?

A. Letters testamentary, filed April 5th 1904, copy of the order — probate, filed April 4th 1904.

Q. Are copies of the will and codicil attached to the letters?

573 A. Yes sir.

Q. And have you there the affidavit of publication of notice to creditors?

A. Yes sir, affidavit of publication of notice to creditors, filed May 2, 1908.

Q. I think you have there in the files of the replevin suit in the circuit court the exemplification of the record of the articles of incorporation of the plaintiff, William W. Bierce, Ltd. Do you find them there?

A. Yes sir. Shall I read the endorsement on it?

Q. Why, yes.

A. "L. 5782. Exhibit 'AA' for identification. William W. Bierce, Ltd., v. C. J. Hutchins, Trustee. Filed March 8, 1904, by Mr. McClanahan. P. D. Kellett, Jr., Clerk."

Q. All right. Now all these court documents and records that you have referred to in your testimony and produced here are the original documents and records?

A. With the exception of certain documents, copies attached to the original, the originals are still—Like the original order of probate and the original will in the matter of the estate of Waterhouse; they are in the office.

Q. Those are the only copies, aren't they, that you have?

A. Yes sir.

Q.—produced,—that is, the copies of the will and codicil?

The COURT: And certified copy of the notice from the supreme court to the circuit court with regard to the disposition of the case?

Mr. PROUTY: Yes, certified copy of the opinion of the Supreme Court of the United States.

Q. That is, none of those documents and records are copies except those in which, in the certificates appended to them, it is set forth that they are copies, is that true? Otherwise they are all originals?

A. Yes sir.

(Witness excused temporarily.)

Mr. PROUTY: Let the record show that the witness leaves the docu-

ments and records which he has mentioned in his testimony with the minute clerk.

The COURT: Let the record show that. I suppose now comes the reading of those instruments?

Mr. PROUTY: Yes, your Honor.

Mr. ROBERTSON: We now offer in evidence, if the court please, defendant's answer to plaintiff's complaint, filed August 20th, 1903, that has been referred to by the witness. Defendant's answer in that case reads as follows, gentlemen—I understand no objection; received in evidence, your Honor?

The COURT: Received.

(Read. Ex. "C.")

Mr. ROBERTSON: We offer in evidence plaintiff's motion for leave to amend its complaint, with the affidavit of E. B. McClanahan attached, dated March 3rd, 1904, filed on the same date.

The COURT: Being no objection it may be read.

Read. Ex. "D.")

Mr. ROBERTSON: I now offer in evidence stipulation for change of venue from the third circuit to the first circuit, and the order of the court thereon. (The two one exhibit) Dated Dec. 16th, 1903.

(Read. Ex. "E.")

We offer in evidence the defendant's bond for costs on 575 motion for new trial, dated and filed Mar. 21, 1904.

And also the motion for new trial, the motion having been filed on the 21st of March 1904 and the bond also filed on the same date.

(Read. Two together, Ex. "F.")

Mr. PROUTY: Of course it should be stated, perhaps, that that motion and bond are offered a little out of their order. The judgment and finding should precede them.

The COURT: Yes.

Mr. ROBERTSON: We offer in evidence the findings of fact, referred to and designated by the witness, dated March 19th, 1904.

(Exhibit "G.") (Read.)

We now offer in evidence, if the court please, the conclusions of law designated by the witness in this record, allowed March 19th 1904, and ask that they be marked Exhibit "H."

The COURT: So ordered.

Mr. ROBERTSON: With the consent of counsel we will consider those conclusions read?

Mr. CATHCART: Yes.

Mr. ROBERTSON: We now offer in evidence the decision of the court in this case, dated March 19th 1904, and designated by the witness and ask that it be received and marked Exhibit "I".

The COURT: So ordered.

Mr. ROBERTSON: With the consent of counsel we will consider that exhibit read?

Mr. CATHCART: Yes.

Mr. ROBERTSON: We now offer in evidence, if the court 576 please, the judgment in the replevin action, designated by the witness, dated March 19th 1904; ask that it be marked Exhibit "J."

The COURT: So ordered.

Mr. LEWIS: Does your Honor permit it?

The COURT: It is merely offered.

Mr. LEWIS: In order to save time in this matter in suit I will make these objections now as formal objections, and I will argue them now if the court desires it,—I prefer not to argue them; let the argument remain over until later on. However I do make them as objections. I object to the receipt of the document in evidence, or admission of this document in evidence, that is the judgment dated March 19th 1904, on the ground, first, that it is a judgment obtained in said action upon a complaint which was amended after the execution and delivery of the return bond upon which the surety in this action, Henry Waterhouse, appeared, in this: First, that the value as stated in the original complaint and affidavit of—upon which the original bond given by the plaintiffs was given, was \$15,000, that value being alleged as the actual value in the complaint and also stated in the affidavit as the actual value of the property. Second, that during the course of the trial the complaint was amended,—first, to change the value of the property as formerly alleged in the complaint at the time the bond was given to a value different from that sum, to wit, a raise from \$15,000 to \$20,000, and also during the course of said trial the value—the complaint was again amended and the value of the property was raised from \$20,000 to \$22,000. Fourth, that during the course of the 577 trial of said action the complaint as it originally appeared in said action at the time the redelivery bond was given was amended so as to change the cause of action from that in which it stood at the time that the bond was given.

The COURT: Change the cause of action? You mean settle the amount of claim?

Mr. LEWIS: No, changing the nature of the cause of action.

The COURT: In what respect, Mr. Lewis?

Mr. LEWIS: I will ask Mr. Cathcart to state that.

Mr. CATHCART: In respect to the contract upon which the action is brought.

The COURT: Oh, different contract?

Mr. CATHCART: Different contract.

(Argument reserved until later. Objection overruled; exception by defendants.)

Mr. ROBERTSON: I will read the judgment, if the court please.

(Reads.)

We now offer in evidence, if the court please, the order of March 23rd 1904, sustaining the plaintiff's objection to the sufficiency of the bond tendered by the defendant on motion for new trial, and ruling defendant to file a sufficient judgment-bond in a sum not less than the amount of the judgment herein on or before March 31st 1904, the same having been produced and designated by the witness.

(Marked Ex. "K." Reading waived by consent.)

We also offer in evidence notice and motion for order requiring defendant to file a new redelivery bond, or, in default, that execution

issue on the judgment, unless the defendant file a bond in double the sum of the judgment, and the affidavits of E. B. McClanahan,

John F. Colburn and Percy M. Pond attached, all filed
578 March 24th 1904, having been produced and designated by the witness. We ask that be marked Exhibit "L."

Mr. WITHINGTON: We object to the offer if it includes the affidavits.

Mr. LEWIS: Incompetent, irrelevant and immaterial; not binding on the—

The COURT: The objection sustained so far as the affidavits are concerned.

(Motion and notice received in evidence. Exception by plaintiff.) (Considered as read.)

Mr. ROBERTSON: Now we offer in evidence, if the court please, order dated March 28th 1904, filed March 29th 1904, ruling that the defendant file a new redelivery bond with two sufficient sureties on or before April second 1904, as Exhibit "M."

Mr. PROUTY: This order I understand counsel concedes to have been properly entered.

Mr. CATHCART: No objection. Its application here we reserve.

Mr. LEWIS: Not binding upon us, in this case.

(Marked Ex. "M." Considered as read.)

Mr. ROBERTSON: We offer in evidence affidavit of Clinton J. Hutchins, filed April second, 1904, referred to and designated by the witness. We offer it as Exhibit "N."

(Offer withdrawn.)

We offer in evidence order of April 2nd 1904 extending defendant's time to file new redelivery bond until 9 o'clock A. M. April 6th 1904. That has been designated by the witness and we offer it as Exhibit "N."

(Considered as read.)

579 We now offer in evidence notice and motion dated April 6th 1904 for the issuance of execution for non-compliance by the defendant with the order of March 28th as modified by the order of April 2nd, including the affidavits which accompany the motion of P. D. Kellett, Jr., and E. B. McClanahan.

Mr. CATHCART: We object, if the court please, to the affidavits, on the ground that they are immaterial and irrelevant, if the court please.

The COURT: The affidavit will not be admitted; the order itself will be admitted.

(Exception by plaintiff.)

(Exhibit "O." Read to jury.)

Mr. ROBERTSON: I now offer in evidence the order of April 8th 1904 ruling that execution issue on the judgment unless the defendant deposit with the clerk on or before 9 o'clock A. M. of April 15th a bond in not less than double the amount of the judgment. We ask that be marked Exhibit "P." Received, your Honor?

The COURT: Received.

Mr. PROUTY: I understand it is conceded here that there was

sufficient cause at the time that order was entered for the granting of that order?

The COURT: I asked them if they questioned the validity. They said they did not.

Mr. WITHINGTON: Whether it had any effect on us in an entirely different question.

(Order read.)

Mr. ROBERTSON: We offer in evidence the execution issued on April 15th 1904, which has been designated by the witness.

Mr. CATHCART: We object to it on the ground it is incompetent, irrelevant and immaterial. We object to it on the ground that it is incompetent to bind us in any way, being rendered upon a judgment which, for the reasons set forth in our objection to the judgment, is not binding upon the sureties in this case, the defendants. We object to it as immaterial, if the court pleases, because the return of the property is in no way dependent upon the issuance of an execution, the condition of the bond being to return it to the plaintiffs in the case, if the court pleases. We object to it, if the court pleases, because the—it is immaterial and incompetent because the return thereon is ambiguous and indefinite and nothing can be gathered therefrom. On the further ground, if the court please, that the judgment on which this execution was issued was reversed by the supreme court of the Territory.

The COURT: Objection overruled.

Mr. CATHCART: Exception.

(Execution read, marked Ex. "Q.")

Mr. ROBERTSON: We now offer in evidence the minutes of the Clerk of this court in this replevin action, which have been identified by the witness, under date of March 7th, 1904. We are going to offer them all but do not ask to read them all. March 7th, 1904, we ask that this be Exhibit "R."

(Argument.)

Mr. ROBERTSON: Then we will offer as much as I am going to read:

"January term, 1904. William W. Bierce, Ltd., vs. Clinton J. Hutchins, Trustee. Before De Bolt, Judge. Dated Monday, March 7th, 1904. 9:30 A. M. Clerk's Minutes. Replevin. Transferred from third circuit. Hearing on motion to amend the complaint. Present, Kinney, McClanahan & Cooper for plaintiff, J. W. Cathcart for defendant. J. L. Horner stenographer. Mr. McClanahan presents a motion; Mr. Cathcart argues, objecting to the motion. The court grants the motion and allows amendments, the same to be made by the clerk. Mr. Cathcart notes an exception to the ruling of the court allowing the motion, also for allowing amendments to be made by interlineations. Counsel in open court agree to stipulate to waive the trial of this case by a jury. The court thereupon, finding that there is nothing for the jury to do, excuses the jury until 10 A. M. on Wednesday."

I have read page 3 and the first three paragraphs on page 4.

Now we offer in evidence the Clerk's minutes of March the 8th 1904.

Same title of cause. "March 8th 1904. Mr. McClanahan asks leave to amend the complaint so as to conform to the proof, to wit, in Exhibit "A" attached to the complaint, second page, by substituting J. M. McChesney for F. W. McChesney, and by adding thereto the words 'By its Treasurer, F. W. McChesney.' No objections, the court allows the amendment."

(Ex. "S.")

We now offer Clerk's minutes of March 9.

(Offer withdrawn.)

We offer in evidence the minutes of March 10th.

(Offer withdrawn.)

We offer the minutes of March 12th, which notes the rendition of the court's decision at the conclusion of the case as follows: "Saturday, March 12 1904, at 10 A. M., before De Bolt, Judge.

Continued from the 11th inst. Same counsel present. The court renders an oral decision finding for the plaintiff to recover the property set out in the complaint, and failing of recovery, fixes the value of said property at \$22,000 on the first day of June, 1903, and damages, interest on said value at the rate of six per cent from said June first, 1903, and costs."

(Ex. "T.")

We now offer that portion of the minutes of March 19th relating to the amendment of the complaint as follows:

"After argument of counsel Mr. McClanahan asked leave to amend the complaint by substituting '\$22,000' in place of '20,000' wherever it appears. The court allows the amendment and directs the clerk to amend the complaint."

(Ex. "U.")

We offer the clerk's minutes, which have been designated by the witness, under date of April the 8th, 1904. This is in regard to the new bond. It reads as follows:

"Friday, April 8th 1904. Before De Bolt, J. Hearing on motion for execution to issue. Present Kinney, McClanahan & Cooper and S. H. Derby for plaintiff; Cathcart & Milverton for defendant. J. L. Horner, stenographer. Mr. McClanahan presents the motion. Mr. Milverton objects to the motion being taken up at this time, reading Rule 6 of the First Circuit Court, and asks that the motion should go over until Monday morning. Mr. McClanahan argues; Mr. Cathcart argues; Mr. McClanahan replies. The court holds that the consideration of the motion is proper at this time and therefore overrules the objection. Mr. Cathcart notes an exception. Mr. McClanahan reads the motion and affidavits of E. B. McClanahan and P. D. Kellett, Jr. Mr. Cathcart reads counter-affidavits of C. J. Hutchins and of G. F. Maydwell. Mr. McClanahan argues, Cathcart argues, McClanahan replies and Mr. Cathcart replies. Court grants the motion and orders execution issue on said judgment unless the defendant herein deposit with the clerk of this court on or before the hour of 9 o'clock A. M. of Friday, April 15th, 1904, a bond in not less than double the amount of said judgment with sureties to be approved by this court, conditioned for the prosecution

of the exceptions had herein without delay and for the performance and payment of the judgment or part thereof which may be rendered on said exceptions by the Supreme Court. Cathcart notes an exception. Mr. Cathcart orally moves the court for further time to and including April 16th, 1904, in which to prepare and present for allowance and file bill of exceptions. Mr. McClanahan objects to the motion. The court grants the motion. P. D. Kellett, Jr., Clerk."

(Ex. "V.")

We now offer in evidence, if the court please, judgment entered by the supreme court of the Territory May 6th, 1905, reversing the judgment of the court below.

(Read Ex. "W.")

Now offer in evidence the order of the Supreme Court of the United States, allowing the plaintiff's appeal.

(Read Ex. "X.")

We ask that this offer, if the court please, Exhibit "X," include the plaintiff's appeal bond filed on January the 13th 1906 and order of supersedeas dated March 5th, 1906, filed on March 23rd, 1906. Also the motion for writ of supersedeas accompanying the order of the Supreme Court of March 5th 1906, with the 584 affidavit attached, and the assignment of errors filed January 13th 1906. That's all.

Mr. LEWIS: We object to the affidavit, your Honor.

(Objection sustained; exception by plaintiff.)

Mr. ROBERTSON: We now offer in evidence, if the court please, certified copy of the opinion and mandate of the Supreme Court of the United States, with the cost bill and judgment entered in the supreme court of the Territory for the appellant's costs and vacating the judgment of May 6th.

The COURT: Order of the Supreme Court of the United States?

Mr. ROBERTSON: No, wait a minute. Certified copies of opinion and mandate of the Supreme Court of the United States—

The COURT: And the cost bill?

Mr. ROBERTSON: With the endorsements on it.

The COURT: And the judgment of the supreme court of the Territory for costs and vacating the judgment of May 6th?

Mr. PROUTY: The judgment for costs and the order vacating the order of May 6th are one order, which we ask to be designated as "Y."

Mr. CATHCART: We have no objection, if the court please, to the judgment of the supreme court of the Territory of Hawaii; we have no objection to the mandate of the Supreme Court of the United States; we object on the ground that they are irrelevant and immaterial in this case. To the opinion of the Supreme Court of the United States and to the cost bill of the Supreme Court of the United States, and to the assignment of errors—Did you have that in?

Mr. ROBERTSON: That was in the last exhibit, "X."

Mr. CATHCART: Well, we overlooked that.

The COURT: It is not in this offer?

Mr. ROBERTSON: It is not in this offer; it is already in.

585 Mr. CATHCART: The mandate of the Supreme Court of the United States is of course competent and material; we admit that. The opinion of the Supreme Court of the United States is absolutely immaterial in this case; the reasons on which they found their judgment and the cost bill of the Supreme Court of the United States is absolutely immaterial in this case.

(Argument.)

The COURT: The decision of the Supreme Court is not evidence. (Exception by plaintiff.)

Mr. CATHCART: We, by mistake, did not catch onto the assignment of errors. We want to object to that, if the court pleases; like to have the court set aside its order admitting that and to consider whether or not it is admissible in this case, the assignment of errors.

The COURT: I will hear you.

(Here the court takes an adjournment to Monday morning.)

586 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LTD., Plaintiff,

vs.

WILLIAM WATERHOUSE et al., etc., Defendants.

MAY 11, 1908.

Mr. CATHCART: In this matter of the assignment of errors, if the court please, the assignment of errors has already been admitted by the court and we ask that, owing to the inadvertence on the part of the defendants, in not noticing that the counsel had offered that in evidence, that it be stricken out, to give us a chance to press our objection, if the court pleases.

(Stricken out pending objections; exception by pl'ff.)

Mr. CATHCART: We object to the assignment of errors, if the court pleases, on the ground that they are incompetent, irrelevant and immaterial. They are absolutely valueless to prove anything in this case.

(Argument.)

The COURT: It serves as a basis; therefore the objection will be overruled.

Mr. CATHCART: Exception.

587 The COURT: The assignment of errors will be admitted in evidence. It may be read.

Mr. CATHCART: Exception, your Honor.

Mr. PROUTY: I would like to have that instrument separately identified as Exhibit "XX." I do not care to read it now.

The COURT: Is it agreeable to have the reading of it waived?

Mr. CATHCART: Yes, considered as read.

(Order allowing appeal read.)

Mr. ROBERTSON: The appeal bond, part of this exhibit, considered as read, Mr. Cathcart?

Mr. CATHCART: All right.

Mr. ROBERTSON: The supersedeas order and motion considered as read, Mr. Cathcart?

Mr. CATHCART: Very well.

Mr. ROBERTSON: And the assignment of errors considered as read?

Mr. CATHCART: All right.

Mr. LEWIS: The affidavit attached to that motion?

Mr. ROBERTSON: Yes; the court ruled out the affidavit; we save an exception to that ruling.

We now offer in evidence certified copy of the opinion and mandate of the Supreme Court of the United States, cost bill and with endorsements thereon, and judgment entered in the supreme court of the Territory for appellant's costs—That has already been offered and passed upon.

Mr. CATHCART: That is exhibit "Y." The cost bill and the opinion were excluded on our objection.

Mr. ROBERTSON: We except to the ruling excluding the opinion and cost bill.

We also offer in evidence as Exhibit "Z" the decision on exceptions in the supreme court, filed March 4th, 1908, and the notice 588 of the decision to the circuit court, filed on the same date.

(Reads.)

(Exhibit "AA.")

We offer in evidence, if the court please, from the records of this court, probate division No. 3669, Estate of Henry Waterhouse, deceased, identified by the witness, petition for probate of will, filed Feb. 24, 1904.

(Considered as read.)

We also offer from the same record order for notice of hearing on the petition, filed Feb. 24, 1904.

(Considered as read.)

Also offer in evidence the affidavit of publication of said notice, filed April 4, 1904. We also offer in evidence letters testamentary issued to William Waterhouse and Albert Waterhouse, dated April 5th, 1904, and filed on the same date.

(Read.)

We offer in evidence from this same record order of probate, filed April 5th 1904.

(Read.)

We also offer in evidence from the same record affidavit of publication of notice to creditors as follows:

(Read.)

The COURT: The will, copy of the will attached to the letters testamentary, will be considered in evidence and as read?

Mr. ROBERTSON: Yes, your Honor.

The COURT: So ordered.

Mr. ROBERTSON: That will be "BB."

Mr. LEWIS: I object to the admission of the petition and the order of time and place of proving will and the affidavit of publication of time and place of proving will. I have no 589 objection to the order admitting the will to probate, the

letters testamentary and copies of the will attached, nor the affidavit of notice to creditors. I object to the other documents because they are incompetent, irrelevant and immaterial.

The COURT: I think they are jurisdictional; therefore the objection — overruled.

Mr. LEWIS: Note an exception.

Direct examination of HENRY SMITH, called and sworn:

My name is Henry Smith, Clerk of the Judiciary Department.

Mr. ROBERTSON: The question is:

Q. State your name and occupation?

A. How long in that office?

Q. How long have you been such clerk?

A. I have been in the supreme court altogether 25 years, but as clerk of the Judiciary Department from 1892.

Q. Were you Clerk of the Judiciary Department during the month of April 1904?

A. I was in the department when we organized, and in the month of April 1904 I was clerk of the Judiciary Department.

Q. I call your attention to an order made by Judge De Bolt, dated April 8, 1904, requiring to furnish or file a bond in 590 double the amount of the judgment, which is Exhibit "P" in this case, and ask you whether any such bond was filed?

A. "I call your attention to an order made by Judge De Bolt requiring defendants to file a bond in double the amount of the judgment, Exhibit 'P' in this case, and ask you whether any such bond was filed." No such bond was filed.

Q. Did you issue execution, and if so is this the execution, Exhibit "Q" in this case?

A. Just the answer, is it? In answer to this question I will say that I did issue execution for the sum of \$1198.20 on the 15th of April, which was just a week after the order made by Judge De Bolt, and on May 27th the execution writ was returned unsatisfied.

Mr. CATHCART: Well, wait a minute. We object to—Move to strike it out.

Mr. ROBERTSON: No objection.

(Stricken out.) (Witness shown paper.)

A. This is the identical writ in question and it is the——

Q. And is this the writ to which your minute note of April 15th 1904 refers?

A. And it is the writ—It is.

Cross-examination.

Mr. CATHCART:

Q. I call your attention to the endorsement on the back of the writ of execution and ask if you can say by whom the writ was returned to your office?

591 A. Just the answer, or shall I read the question? If I can say by whom this writ was returned to my office? I will say by——

Mr. PROUTY: I object to it if the question is asked to impeach the return; that is, to show that the sheriff did not return it, because the sheriff did return it, according to the endorsement on the writ.

The COURT: Returned? Who physically handed it in?

Mr. CATHCART: Who brought it back to the office.

Mr. PROUTY: I object to that as immaterial.

Mr. CATHCART: I will modify the question,—by whom the writ was brought to your office?

The COURT: As distinguished from legal return, I suppose that is what you mean.

Mr. PROUTY: I object to that as immaterial.

(Objection overruled.)

A. It seems to me that question ought to be addressed to Clerk Thompson. I did not receive it.

Q. You don't know?

A. I can't say, except from that endorsement.

Q. By whom was the endorsement made if you know?

A. This endorsement is made by J. A. Thompson.

(Objection overruled.)

A. The clerk.

Q. J. A. Thompson, the clerk?

Mr. ROBERTSON: Save an exception.

Mr. CATHCART:

Q. To whom was this writ delivered when you issued it?

A. That——

(Objected to as immaterial. Objection overruled.)

A. It is so long ago——

(Exception by p'l'ff.)

592 A. —I can't well remember, unless it was either Mr.— Judge Cooper or Mr. Derby.

(Motion by plaintiff to strike out the answer as not stating a personal knowledge of the witness. The latter part stricken out as not being responsive, that is "Judge Cooper or Mr. Derby.")

Q. Was it not delivered to one of the attorneys of the plaintiff William W. Bierce, Ltd., either to Mr. Kinney, Mr. McClanahan, Mr. Cooper or Mr. Derby?

A. Is it technically a question of delivery or a question to whom addressed the writ is?

Q. I am not on the stand; you are on the stand and I am cross examining you.

A. I will answer the question this way, that the writ was to the high sheriff through plaintiff's attorney. That's right.

Q. You gave it to plaintiff's attorneys?

A. Yes, I gave the writ to plaintiff's attorneys, one of them.

Mr. PROUTY: Will you state when, so as not to make it necessary to redirect examine.

Mr. LEWIS: You can put that in. It was on the 15th of April.

Mr. CATHCART:

Q. And you gave it to plaintiff's attorneys on April 15th?

A. Yes, on April the 15th, that is right.

Mr. PROUTY: On the same date it was issued?

Mr. CATHCART: All right.

Q. Date of issue?

A. Yes, the date of issue.

(Motion by plaintiff to strike as immaterial. Denied.)

Q. As to when or if at all it came into the hands of the high sheriff you don't know?

(Objection as immaterial. Overruled.)

593 A. Well, "as to when or if at all it came to the hands of the high sheriff do you not know",—I can't say positively as to that.

Redirect examination.

Mr. PROUTY:

Q. This execution was issued out of your office and brought back and filed in your office in the usual and regular course of business of your office as clerk of the Judiciary Department, is that the fact?

Mr. CATHCART: We object to that, if the court please, incompetent, irrelevant and immaterial; not proper redirect examination. The execution speaks for itself and the law speaks for itself.

The COURT: I think it is redirect

Mr. CATHCART: Exception.

A. "This execution was issued out of your office and brought back and filed in your office in the usual and regular course of business of your office as clerk of the Judiciary Department, is that a fact? The trouble is certain question—

Q. Answer it yes or no.

A. put to me as to the writ and other question put to me as to the cover of that writ. The cover is by Thompson; the writ itself is by Smith. What shall I say? I shall say that I believe it is the same—I don't know—Writ was issued and it came back in Thompson's hands; I believe so.

Q. Is there anything upon this writ to indicate to your
594 mind that it was issued and returned other than in the usual and ordinary way?

A. Writ, the whole document.

Q. Read the question.

A. Yes, it is.

Q. Answer the question yes or no.

Mr. CATHCART: I want to object further on the ground that it is leading.

The COURT: Owing to the fact that Mr. Smith has to be questioned by written question on the paper, he being deaf, the court will exercise its discretion and allow the question to be repeated. Objection overruled on that ground.

Mr. CATHCART: Exception.

Direct examination of ALBERT WATERHOUSE, called and sworn.

Mr. ROBERTSON:

Q. You are one of the executors under the will of the late Henry Waterhouse?

A. Yes sir.

Q. State whether or not the plaintiff in this case, William W. Bierce, Ltd., filed with the executors under the will of Henry Waterhouse a claim against the estate?

A. Yes sir.

Mr. LEWIS: I object to the question—one second. I object to that as incompetent, irrelevant and immaterial, unless he
595 designates which of two claims were presented.

Mr. ROBERTSON:

Q. State whether or not there was more than one claim presented?

A. Two claims.

Q. Do you remember the dates on which those claims or either of them were filed with you?

A. I think one was on September 6th or thereabouts, 1904, and the other one was on September 30th, 1904.

Q. I will show you this claim here signed by the Bierce Co. Ltd., by S. H. Derby, dated September the 6th, and ask you if that is the first claim you refer to?

A. I believe it is.

Mr. ROBERTSON: We offer it in evidence.

Mr. LEWIS: If your Honor please, we object to the admission in evidence of the claim subscribed and sworn to on date of September 6th, 1904, now sought to be offered in evidence, on two grounds: First, that it is incompetent, irrelevant and immaterial because this is not the claim upon which plaintiff lays his foundation for his cause of action in this case. Second, the claim is incompetent, irrelevant and immaterial, more particularly incompetent, on the ground that it does not comply with the statute. The statute requires that the claim when presented, if it shows any statement of claim or voucher, shall be duly authenticated. There is nothing to show the authenticity of the bond attached to the complaint.

(Argument.)

Mr. PROUTY: We have a letter rejecting this first claim, your Honor, and I think it should be offered.

The COURT: Have you any letter or have you any rejection
596 of the second one?

Mr. ROBERTSON: They took no action on the second claim; that is the reason we claim we are entitled to put in two, to show the whole transaction. The first one was rejected in writing, and the second one, no attention paid to it.

The COURT: With that understanding then I will admit this in evidence; otherwise it would be immaterial.

Mr. LEWIS: We note an exception.

The COURT: This is with the understanding that you will offer the letter in evidence.

Mr. ROBERTSON: Yes your Honor. This will be Exhibit "CC".

Q. What if any action did the executors take with reference to this claim?

A. They rejected it. It was rejected.

Q. In writing?

A. In writing.

Q. I will ask you whether or not this paper that you are now handing me was the letter rejecting that claim?

A. It is.

Mr. ROBERTSON: We offer this in evidence.

Mr. LEWIS: Same objection would apply to the offer.

The COURT: O yes, I understand.

Mr. LEWIS: I urge the same grounds of objection to this letter as grounds of objection to the admission of the first claim of September 6th.

The COURT: This may be received in evidence,—that is the letter of rejection.

Mr. LEWIS: Exception, your Honor.

Mr. ROBERTSON:

Q. This is your signature to this letter, is it not?

A. Yes.

597 Q. What did you do with this letter and the rejected claim?

Mr. CATHCART: We still have the same objection to this.

The COURT: Same ruling.

Mr. CATHCART: And exception.

A. I don't know what I did with it. It was either mailed or delivered, I don't know which.

Q. To Bierce's attorneys?

A. Representatives.

Q. The letter addressed to Kinney, McClanahan & Cooper rejecting the claim of Bierce; that is to say, you sent it to Kinney, Ballou & McClanahan either by mail or otherwise?

A. It was sent to Kinney, Ballou & McClanahan; I don't know how.

Mr. ROBERTSON: Will you consider this first claim as read?

Mr. LEWIS: I will consent to the documents being read, with a

reservation protecting me on my exception to the admission of the documents in evidence.

The COURT: This is always understood.

Mr. ROBERTSON:

Q. Now, Mr. Waterhouse, you said there was a second claim filed. Have you that here?

A. I believe this is a copy of it.

Q. That is the original, isn't it?

A. Yes, I believe this is the original.

Q. This is the one that you handed me last week, Thursday or Friday?

A. I didn't hand you any.

Q. Oh, I guess your attorney did.

Mr. PROUTY: It was produced here by Mr. Lewis as his counsel; that is understood I think.

Q. You understand that to be the fact, don't you?

598 A. Yes.

Mr. ROBERTSON: Then we offer this in evidence, your Honor.

The COURT: It may be received.

(Ex. "DD".)

I think the two claims and the letter of objection should be fastened together as one exhibit; wouldn't that be better?

Mr. ROBERTSON: The letter is "DD".

Mr. LEWIS: In order to preserve defendants' rights in this matter we object to the introduction of this claim of September 30th being produced in evidence on the ground that it is shown by the admissions of counsel and the pleadings of their complaint that the suit was instituted on this claim prior to any rejection of the claim by the executors.

The COURT: It will be admitted.

Mr. LEWIS: Exception.

Mr. ROBERTSON: We ask it to be marked "EE" then.

The COURT: Are you willing to waive the reading of the two claims and the letter?

Mr. LEWIS: Subject to exceptions reserved, yes.

(Reading waived; considered as read.)

Mr. ROBERTSON:

Q. State whether or not the executors took any action with reference to the second claim that you have referred to?

A. What's that?

Q. State whether or not the executors took any action with reference to this second claim?

A. I believe it was rejected?

Q. You believe it was rejected?

A. Yes, my recollection.

599 Q. That is to say, your understanding is that both of the claims were rejected?

A. That is my recollection of it.

Q. You are still an acting executor of this estate, are you not?

A. Yes sir.

Cross-examination.

Mr. LEWIS:

Q. I call your attention to the complaint in this action, subscribed and sworn to on October 11th and served upon you as executor of the estate on October 12th 1904, and ask you whether or not the claim introduced in evidence by plaintiff, subscribed and sworn to on the 30th day of September, was rejected by the executors of the estate of Henry Waterhouse prior to October 11th and October 12th?

A. No sir.

Q. It was not?

A. It was not.

Q. You are positive of that fact?

A. Yes sir.

Redirect examination.

Mr. PROUTY:

— You are one of the defendants in this suit, Mr. Waterhouse, are you not?

600 Mr. LEWIS: I object to that as improper redirect examination.

The COURT: Objection sustained.

Mr. PROUTY:

Q. You said that the second claim offered in evidence was rejected by the executors, the defendants in this case, after October 12th 1904, is that the fact?

Mr. LEWIS: We object to that as improper redirect examination and the question has already been asked and answered.

(Argument.)

Mr. PROUTY:

Q. It was rejected then after the beginning of this suit, was it?

Mr. CATHCART: We object to that as incompetent, irrelevant and immaterial and not proper redirect.

Mr. PROUTY:

Q. When was it rejected?

A. Sometime after this date; I don't remember.

Q. Some time after what date?

A. After October 11th 1904.

Mr. CATHCART: We object to that if the court please, being incompetent, irrelevant and immaterial as to when it was rejected unless they show it dated in accord with the statute.

The COURT: I think the question is proper.

Mr. PROUTY:

Q. Do you know when?

A. No sir, I don't know the exact date.

Q. How was it rejected?

A. Why, either verbally or in writing; I don't know, I don't recollect which.

Q. That is you mean to say that you and your brother
601 got together and looked it over and said between yourselves that you wouldn't allow it?

Mr. LEWIS: I object to that as incompetent, irrelevant and immaterial and not proper redirect examination.

Mr. PROUTY:

Q. Or don't you remember whether that was done that way or not?

Mr. LEWIS: Argumentative.

The COURT: I think that the question is proper. Objection overruled.

Mr. CATHCART: Exception.

(Question read.)

Mr. CATHCART: We object to it as leading.

The COURT: I will permit the question.

Mr. WITHINGTON: We except.

The COURT: What is your answer, Mr. Waterhouse? Give us your best recollection of what occurred and what you did; that is, if you do not remember exactly.

A. My recollection is that the claim was rejected; just when or how I don't remember.

Mr. PROUTY:

Q. You don't know when it was?

A. I know it was after that date, after the filing of this suit; I know positively of that date for nothing had been done before, but my recollection — is was rejected after.

Q. Had not been acted upon until the time this suit was brought?

A. No sir.

Q. Had not been either rejected or accepted, that is true, isn't it?

A. Yes.

602 Q. Well now, how long after the suit was brought; how long after October 12th?

Mr. LEWIS: I object to that as incompetent, irrelevant and immaterial, already asked and answered.

Mr. PROUTY:

Q. Well, I don't care for the exact day and hour. About how long was it?

(Objected to as incompetent, irrelevant and immaterial. Objection overruled.)

Q. About how long?

A. I haven't any idea.

Q. Well, was it a month or two months——

(Defendants take exception to the last ruling.)

Q. —or six months?

A. Might have been a month or year or two years; I couldn't remember.

Q. Couldn't tell?

A. No sir.

Q. Did you make any memorandum of it in any of the books or papers that you kept as executors, so far as you know?

(Same objection and ruling.)

A. No memorandum.

(Exception by defendants.)

Q. You say it was rejected; what do you mean by that?

(Objected to.)

Q. How was it rejected?

Mr. WITHINGTON: That has already been asked. We object to it. It would be incompetent, irrelevant and immaterial, improper redirect.

(Question withdrawn.)

603 Mr. PROUTY:

Q. After you received this claim from Kinney, McClanahan & Cooper—I refer to the second claim of September 30th 1904—what did you next do about it?

Mr. CATHCART: We object to that, if the court please, incompetent, irrelevant and immaterial, and not redirect.

The COURT:

Q. In your direct examination you said that this claim had been rejected. How do you know that it was?

A. I said it was my recollection that it had been rejected.

Q. You have some recollection of rejecting it?

A. Yes sir.

Q. What is that recollection?

A. Well, it is vague.

Q. Well, I mean what is it you remember; what is it that brings it to your mind?

Mr. CATHCART: The court give us an exception, if the court is going to overrule our objection? We object to the questions put by the court on the ground they are incompetent, irrelevant and immaterial.

(Question withdrawn.)

Mr. PROUTY: I want to know what he did. He says he rejected it; I want to know what the witness understands by rejecting.

(Argument. Objection sustained.)

Q. After you received the claim what did you do with it?

Mr. CATHCART: We object to that as incompetent, irrelevant and immaterial and not proper redirect.

(Here the court takes a recess to 1:30 P. M.)

604

Afternoon Session, May 11th, 1908.

Examination of ALBERT WATERHOUSE, Resumed.

(Last question read.)

Mr. CATHCART: We object to that, and have objected to it, as being incompetent, irrelevant and immaterial and not proper redirect testimony.

Mr. PROUTY: I want to find out the truth, nothing more,—just what he did with that claim,—and the reason why I want to find it out is this: we were necessarily, when we brought this suit, compelled to frame the allegation based upon the facts as we could ascertain them from adverse parties, namely from our adversaries in this suit, and we made this averment.

(Argues.)

The COURT: I think the objection should be overruled; the objection accordingly is overruled. I might give, though, my reasons for it, so the record will show. It is a very frequent practice, frequently occurs, that the pleadings are amended to correspond with the proof; a fact may be developed, a fact the pleader knew nothing of and had no opportunity to know anything of at the time the pleadings were prepared, and for that reason it is proper and the courts always allow it to be amended to correspond.

605 The pleadings were framed and facts alleged as they then appeared to the pleader, the facts presumably being in possession of the adverse party; it is hardly to be expected that all of the facts would be obtainable as if they were in the hands of the parties instituting the suit. Those are all elements that are proper to be taken into consideration, and if there is any discrepancy between the pleadings and the proof the pleadings could be amended.

Mr. CATHCART: Exception.

Mr. WITHINGTON: Would your Honor allow us to propose still another objection, namely, that the pleadings in this case have been settled on demurrer and complaint as they stand, and that it is not competent for the plaintiff, having proved his case as it stands in the complaint, to seek now on redirect to get information on which he can amend his complaint.

The COURT: Objection overruled.

Mr. CATHCART: The court is asked an exception to the ruling.

(Question again read.)

A. My recollection is that I took it to my legal advisers; we talked it over; I then consulted with my uncle who was in Pasadena.

Mr. PROUTY:

Q. Who was your uncle?

A. Mr. William Waterhouse.

Q. William Waterhouse?

A. Yes.

Q. Is he also one of the executors?

A. Yes sir.

Q. And was he in Pasadena at the time you received it?

A. Yes sir.

Q. And you waited until he came down here and then consulted with him about it?

606 Mr. CATHCART: I object to it as leading and not redirect.

Mr. LEWIS: Your Honor will give us an exception to this whole line of testimony?

The COURT: Very well, so understood.

Mr. PROUTY:

Q. After he came down here you talked it over with him, did you?

A. I don't know whether after he came down here; I think it must have been, though. May have written to him about it or I may have waited until he came down here and we talked it over, I don't know.

Q. And you remember showing him the claim?

A. I believe he has seen the claim; I don't know whether he has actually seen the claim; he knows what the claim was about.

Q. You either showed it to him or told him what it was about?

A. Yes.

Q. Now you are sure that that conversation was with reference to this second claim, Exhibit "EE"?

A. I suppose so; it must have been.

Q. Well now, I want you to testify with reference to what you did concerning the second claim and not the first one.

The COURT:

Q. The first one you remember you have already stated was rejected in writing.

A. Yes sir.

Mr. PROUTY:

Q. Yes, your testimony is with reference to this claim now.

A. Yes sir.

Q. And you are sure you talked this over with your uncle,

607 William Waterhouse?

A. Yes sir.

Q. And you and he decided that you would reject it. You consulted your counsel first, did you?

A. Yes sir.

Q. And acted under his advice?

A. Yes sir.

Q. And you don't know how long ago that was?

A. No sir.

Q. Couldn't you tell about when it was, Mr. Waterhouse?

A. I couldn't tell within quite a period of that time, I don't think.

Q. Have nothing, no record of it, that would refresh your recollection about it?

A. No sir.

Q. Did you ever talk with anybody else about it than your uncle?

Mr. LEWIS: I submit that is wholly incompetent, irrelevant and immaterial.

Mr. PROUTY:

Q. Well, is that all, that you did with it?

A. Yes sir.

Q. Did you talk with anyone else other than your counsel and Mr. William Waterhouse about this claim?

Mr. LEWIS: I still object.

(Objection overruled.)

Mr. LEWIS: Ask an exception.

A. What is the question?

(Question read)

Mr. LEWIS: May I ask to interpose this further objection that it is indefinite, absolutely no time limit placed.

608 Mr. PROUTY: At any time after he received it.

Mr. LEWIS: Same objection.

(Objection overruled.)

A. I don't know; I may have, may not have.

Mr. PROUTY:

Q. You have no recollection of it?

A. I have no recollection of it, no sir.

Q. Did you ever correspond with anyone else other than your uncle and counsel?

(Same objection, ruling and exception by defendants.)

Q. Have you any recollection of corresponding with anybody?

A. No, I have not. I may have corresponded. I have no recollection of it.

Q. But you don't remember?

A. No sir.

Q. Your uncle William Waterhouse, since his appointment as executor of the estate of your father, has resided in Pasadena, I understand?

A. Yes sir.

Q. And the more active duties of the administration of the estate have devolved upon you here, have they not?

A. Yes sir.

Q. Now you stated that you remembered distinctly that you had not rejected this claim at any time prior to October 12th 1904, which is the date of the beginning of this suit and of the service of summons. What fixes that date in your mind?

A. The mere fact that the suit was begun before we had taken any action on the bond fixes that in my mind.

Q. That is the date in the complaint here?

A. Yes sir; when it was served on me I knew that it had not—we had not taken any action on it.

Q. And have you any recollection of that time independent of the complaint here that was shown to you by Mr. Lewis?

A. I didn't catch that.

Q. Have you any recollection of this date, October 12th 1904 independent of the paper which Mr. Lewis showed you, the complaint and summons here? I mean this paper (showing).

Mr. WITHINGTON: I object to that on the ground that he has already answered the question by saying that that is the way he remembers it.

(Objection sustained.)

Recross-examination.

Mr. LEWIS:

Q. By Pasadena, by your reference to Pasadena, Mr. Waterhouse I presume you mean a city in California?

A. Yes sir.

Q. State of California?

A. Yes sir.

610 Direct examination of F. B. McSTOCKER, called and sworn

Mr. ROBERTSON:

Q. Your name is Francis B. McStocker?

A. Francis Blakeley.

Q. You reside in Honolulu?

A. Yes sir.

Q. Are you the treasurer of the Kona Development Co. Ltd.?

A. I am.

Q. State whether or not you have brought with you, pursuant to the subpoena issued to you, a deed from Clinton J. Hutchins to yourself, dated November the 7th 1905, conveying certain property formerly belonging to the Kona Sugar Co.

A. It has been impossible for me to bring the deed cited in the subpoena; I have made a careful search for it. One of the deeds mentioned, from the Kailua Sugar Co. to myself, was sent back to San Francisco on account of some error in the execution and acknowledgment; it was sent back to be re-acknowledged to Chickering & Gregory, and presumably it has been lost in the fire but we have not been able to find out yet exactly what has become of it. We are chasing it up to make a search for it.

Q. Do you remember if that deed was ever recorded?

A. No, it was not, because the acknowledgment was faulty, deficient, and would not be accepted here, so it was sent back for the purpose of having it re-acknowledged, properly acknowledged.

611 Q. Well, how about this deed from Clinton J. Hutchins, dated November the 7th, 1905?

A. I have certified copies of two deeds. During some recent arbitration affairs the deeds were taken out of our vault and I have not been able to locate the originals yet. I have a copy of a deed, F. B. McStocker to the Kona Development Co., which you called for, and deed, C. J. Hutchins to F. B. McStocker, that is, a copy.

Mr. WITHINGTON: Wait a minute. Before they are called for I want to raise the question whether any of these is admissible. My point is, I don't think counsel on the other side can bring papers into court which are immaterial in the action, which are not part of the public files, not papers which relate to matters now in issue in this action, and inspect them. I object to your examining that at all. (To Mr. Robertson:) I object to your examining that until the court rules.

(Seizes hold of paper in Mr. Robertson's hands.)

The COURT: I ask you to desist (to Mr. Withington).

Mr. WITHINGTON: I submit, may it please your Honor, that is the point I am asking your Honor, whether he should at least make some proffer upon which it may be material to the case. So far nothing has been shown that it is in any way material to the case, and counsel proceeds to examine papers before—

The COURT: I think they have a perfect right to do that. I am somewhat surprised at your conduct, Mr. Withington.

Mr. WITHINGTON: I desire to except to your Honor's ruling, and also to your Honor's comment on my conduct.

The COURT: Exceptions may be noted. Let the record show that, so it will be complete, while Mr. Robertson was examining the paper, Mr. Withington advanced, grabbed the paper, and 612 sought to take it from him in open court in the presence of the jury. That is the conduct to which the court alludes.

Mr. WITHINGTON: I would like to call the court's attention to the fact that I did not seek to take it from him; I merely put my hand over it. I submit in a court of justice we have a right to at least have stated to the court whether papers are material or not.

The COURT: Oh, I think not. You can examine it but one counsel might think it was material and opposing counsel might think not.

Mr. CATHCART: When papers are brought into court and when the witness is asked to produce them, and counsel goes up and takes them from him, and then we come up and make a formal objection to their being introduced—or being handed to counsel, is it not—to their being brought into court and handed to counsel, and state to the court that we don't think it is right, we want to make an objection to their examining them, isn't it only fair that counsel should wait until the court rules on our objection before he proceeds to examine the papers? We submit we are right here and that counsel has gone to work and examined papers while we have a motion pending before the court.

Mr. WITHINGTON: And you Honor stated you were powerless to enforce it. I simply put my hand over the face of the paper.

The COURT: I observed what took place. There is no occasion to discuss it further, Mr. Withington. Mr. McStocker is plaintiff's witness; I think so far Mr. Robertson has proceeded regularly.

Mr. LEWIS: When we object to certain documents being
613 introduced in evidence——

The COURT: Wait until they are offered.

Mr. CATHCART: Being brought into court and handed to counsel, haven't we got a right to have the court rule on that before we proceed? We will note an exception to the ruling of the court. We would like to have your Honor's ruling on the last matter, that we haven't any right to make this objection, and would like to except to it.

The COURT: Exception may be noted.

Mr. ROBERTSON:

Q. Do I understand you to say, Mr. McStocker, that the original of this deed from Hutchins to yourself, dated November the 7th, is where?

A. I didn't say the original of that deed at all; I said that there was one deed to me which is missing, the one you called for in your subpoena, the Kailua Sugar Co. to McStocker. I haven't got it; it was sent back to San Francisco to be re-executed.

Q. I thought you said something about some arbitration?

Mr. LEWIS: At this particular time I desire to make an objection, which I hope the court will bear me the indulgence to listen to.

The COURT: I am always ready to listen to any objections.

Mr. LEWIS: Thank you, your Honor—And that is this,—if a document by its face, when shown, bears a date which is subsequent to the suit——

The COURT: Of course I don't know anything about that.

Mr. LEWIS: We tried to object to it. Unless there is some statement made to connect that document, which on its face shows
614 — to be immaterial, then we maintain that the court has the right to look at the document and to ask counsel to in some way connect it, without going to work and spreading something on the records here, some preliminary proof which may be entirely immaterial.

(Argument.)

The WITNESS: Well, Judge, may I speak? You issued——

The COURT: Perhaps the least talking the best.

The WITNESS: Well, but you have made the statement here I brought documents from my pocket. You issued a subpoena from your court that I shall bring documents on a certain date. I have brought them. The date shows on the subpoena, the date that the documents were brought.

The COURT: As a matter of fact the Judge never knows anything about a subpoena, never pays any attention to it. They are issued by the court——

The WITNESS: I presumed that when I got an order to bring documents into court I am supposed to bring them or be in contempt; otherwise I should have refused to bring them, because

in my own opinion I considered that they didn't have anything to do with the matter.

The COURT: That may be mine when I have an opportunity to examine them. I haven't yet seen it.

Mr. LEWIS: I would like to have the court rule on my motion that no further proof be introduced or no further questions asked relative to these questions until counsel comes forward with an offer to connect.

The COURT: I think we will have to wait until this instrument is offered and then I will pass on the materiality of it. Objection overruled.

Mr. LEWIS: Allow an exception.

615 The WITNESS: Certain deeds were called for in a certain question of arbitration between the Kona Development Co. and one of the planters, and I took the deeds to Kona with me at that time; I haven't since located the originals. Whenever I take a deed from the vault I have a certified copy made to leave there; I am rather reluctant to pass my papers over to attorneys and courts usually, and sometimes do not get them back for a long while, so I take a copy. Those copies are the ones that belong in my files. If I could find the originals and they are demanded by the court I will look them up.

Mr. ROBERTSON:

Q. Well, this paper, one of these papers you handed me, contains a certificate of Walter C. Dunne, dated May 11th, that is today, that this is a correct copy of the original.

Mr. LEWIS: Same objection.

A. Well, the document has been in my——

The COURT: Same ruling.

Mr. LEWIS: Exception.

A. —vault and had been compared before it was sent up to me in Kona some months ago. I told Mr. Dunne in order to get it accepted here, if the deeds had to be accepted, that he shall certify he was the one that compared it originally. It was not compared today.

Mr. ROBERTSON:

Q. That is to say, the original was filed in court——

A. I did not say so.

Q. —in Kona?

A. I didn't say so. I say I have made a search for it and up to the present time have only found the copies. I took them in Kona.

Q. When was it when you last saw it, the original?

616 A. Last saw it in a—last time I saw it was in a paper bundle that I had a lot of other documents, that Mr. Cathcart is cognizant. I took them up there; he was the attorney for the other side.

Q. You handed them over to Mr. Cathcart, is that it?

A. No, I didn't; some I left there and made a record there.

Q. Well, you say this original when you last saw it was in the package with other papers?

A. Some of which were taken out and given to the court and some of which I brought back.

Q. What was done with the original of this deed?

A. Well, that—that I have got to find out. I told you I would make a search. You served a notice on me at ten o'clock in the morning to come up here. I have got to make search for that deed; if I can find the original I will bring it up. It is probably somewhere among my papers; I have various papers, various files of various kinds.

Mr. ROBERTSON: I presume the witness better be excused to make the search.

The COURT: Then as I understand you have no further questions?

Mr. ROBERTSON: I guess we are at a stand-still until the witness searches for the original.

The WITNESS: I would like to ask the court whether it is—I would like you to rule whether it is necessary for me to leave my business to come up here on something that you may afterwards decide is not material?

The COURT: I couldn't decide it. Anyone is subject to subpoena.

(Witness excused temporarily.)

617 Mr. ROBERTSON: I now ask leave to read in evidence the depositions of Columbus Bierce and of E. W. Holden, taken pursuant to commission heretofore issued by the court.

(Reads direct interrogatories and Mr. Cathcart reads cross interrogatories.)

Mr. ROBERTSON: I presume this had better be marked as an exhibit. We offer it. We ask it be marked Plaintiff's Exhibit "FF", the deposition and the envelope in which it was placed, bearing the endorsement of J. A. Thompson, Clerk.

The COURT: So ordered.

Mr. ROBERTSON: October 23rd 1907.

Mr. PROUTY: If your Honor please, I offer in evidence the exemplification of the record of the articles of incorporation of William W. Bierce, Ltd., plaintiff, dated December 2nd, 1895. The record is exemplified under date of July 27th, 1903. It is authenticated by the attestation of the keeper of the record, and by the certificate of the presiding Judge of the court, and also the certificate of the clerk of the court and under the seal of the court, in the manner provided by Section 906 of the Revised Statutes of the United States prescribing how any one of the judicial public records shall be authenticated in order to be admitted as evidence in all the courts.

Mr. CATHCART: We object to it as incompetent, irrelevant and immaterial; no proper foundation has been laid for its introduction.

The COURT: You contend it does not comply with the statute?

Mr. CATHCART: Yes, if the court please. The certificate here of a notary public (reads).

Mr. LEWIS: It is only hearsay.

618 Mr. CATHCART: And then the judge certifies that he is a notary public and that the attestation is true. There is nothing, if the court please, to show that by any law of the State of Louisiana this notary public is the keeper of the records of incorporations. It shows there on the face of the certificate that he is not the keeper of the records, because what he certifies to is that it is recorded in his office.

(Argument.)

The COURT: Well, we will postpone it for the present, Mr. Prouty, and take up some other phase of the case.

Direct examination of J. A. THOMPSON, recalled.

Mr. PROUTY:

Q. Mr. Thompson, have you computed the interest on the value of the property as assessed in the judgment of March 19th 1904 in the replevin suit of William W. Bierce, Ltd., against Clinton J. Hutchins, Trustee, at \$22,000, and also on the judgment for costs rendered in the same suit on September 27th, 1907, by the Supreme Court of the Territory of Hawaii?

A. I have.

Q. If you have prepared such a computation will you be good enough to state what the items are, first stating the amount of the judgment and then the interest, and the judgment for costs and the interest on that.

619 Mr. CATHCART: We object to it as incompetent, irrelevant and immaterial.

Mr. LEWIS: And on the further ground, your Honor, stated in my objections at the time, that at the time the bond was entered into the allegation of value was \$15,000 and the affidavit accompanying the complaint at that time was \$15,000; that subsequently thereto, after the execution and delivery of the bond in question, the complaint was amended to show, first \$20,000, and afterwards \$22,000, and also that the complaint was—made a separate and distinct cause of action at the time it existed—at the time of the execution and delivery of the bond.

The COURT: I suppose this means of course the legal interest existing at the time?

Mr. ROBERTSON: Six per cent.

The COURT: Six per cent right through?

Mr. ROBERTSON: Yes.

The WITNESS: At the request of Mr. Prouty I computed it at the rate of six per cent from the date of the issuing—issuance of the execution to date.

The COURT: That would be less than the legal rate?

Mr. ROBERTSON: Yes, your Honor; we make them a present of two per cent.

Mr. CATHCART: We object to a computation of any kind as being incompetent, irrelevant and immaterial, if the court please.

The COURT: Of course this is something that the jury might do for themselves, but—objection overruled.

Mr. CATHCART: Exception.

Mr. LEWIS: Note an exception to ruling on Mr. Cathcart's objection in addition to my own.

620 The COURT:

Q. You may state.

A. The total amount of interest on the \$22,000, the amount fixed in the judgment, dating from the 15th of April 1904 to date, May 11th 1908, at six per cent, is \$5,371.65, for four years and 25 days, and the interest on judgment for costs, per order of the court, in the supreme court—

Mr. PROUTY:

Q. What is the amount of that judgment?

A. Oh, the total amount of the judgment and the interest on judgment \$27,371.65.

Q. No, that is, not the whole thing: I want the separate items. First you have the amount of the judgment for the value of the property, \$22,000?

A. \$22,000.

Q. Now the interest on that. Now the next is the judgment of the supreme court for costs; what does that amount to?

A. It included the two items of United States Supreme Court and Territorial, making \$748.57, the total amount of the two items, and the interest on that amount from the 27th of September 1907 to May 7th, last Thursday, that would be seven months—

Q. You didn't compute it up to today?

A. No, I had this item computed at that time, or until you spoke to me about this other item to be computed to date.

Q. What is it?

A. Would be \$36.52.

Q. And what do you make the total?

A. \$28,156.74.

The COURT: Wouldn't it be a good idea to have this little slip filed with the papers?

621 Mr. PROUTY: Yes.

Q. Does your memorandum now show the amounts?

A. Yes sir.

The COURT:

Q. And the memorandum is correct and in accordance with your testimony given?

A. Yes sir.

The COURT: Merely to have something to refer to, that would be all.

Mr. CATHCART: You can have it filed—I don't want it in evidence—filed for the purpose of court and counsel.

The COURT: Yes, that's all; merely as a memorandum. Well, any further questions of Mr. Thompson?

Mr. PROUTY: Well, I offer this in evidence, your Honor, as Exhibit "GG".

Mr. CATHCART: We object to it as incompetent, irrelevant and immaterial, if the court please.

The COURT: Let's see, it is a memorandum. Oh, I think it may be admitted in evidence.

Mr. CATHCART: Exception.

The COURT: It is easier than having the reporter turn back and read it from his notes.

Cross-examination.

Mr. CATHCART:

Q. \$28,156.74?

A. My total; I have forgotten.

Mr. PROUTY: Just a word, Mr. Thompson.

Q. I understand you to say——

622 A. One thing I may have failed to add is that the rate on the amount of judgment for costs is at eight per cent.

Q. Yes, that is the rate on the judgment——

A. Seven fifty-eight.

Q. Judgment of the supreme court of the Territory?

A. For costs, yes.

Q. September 27th, 1907?

A. Yes, at the rate of eight per cent, yes.

Mr. ROBERTSON:

Q. And the other at the rate of six per cent?

A. Six per cent right through.

Q. Straight; no compounding, was there?

A. No sir.

Mr. CATHCART:

Q. When did you figure this interest; when did you figure it?

A. Yesterday on the \$22,000 item, although I had figured a few days ago on that amount at the request of Mr. Robertson and they changed the rate of the percentage, making it six right through, and I figured that on yesterday.

Q. At the request of Mr. Prouty?

A. Six per cent, yes.

Q. You made it \$28,156.74?

A. That is the total.

F. B. McSTOCKER, recalled.

Mr. ROBERTSON:

Q. Mr. McStocker, have you found the original of that deed from Hutchins to yourself?

623 A. From Hutchins to myself, yes. Who does it go to, the court or the counsel?

Mr. ROBERTSON: Suit yourself.

(Document handed to Mr. Robertson and shown to counsel.)

Mr. ROBERTSON: We offer this in evidence, your Honor.

Mr. CATHCART: We object to it, if the court please, incompetent, irrelevant and immaterial.

Mr. ROBERTSON: Particularly item four, your Honor.

(Argument.)

The COURT: I will admit it as evidence, particularly as to paragraph four there. Objection overruled.

Mr. CATHCART: Give us an exception.

The WITNESS: Is it admitted, Judge?

The COURT: It is admitted in evidence.

The WITNESS: I would like to have a receipt for it.

The COURT: Read it into the record.

Mr. ROBERTSON (reading): "Know all men by these presents that I, Clinton J. Hutchins, acting both individually and as trustee, of Honolulu, Territory of Hawaii, in consideration of the sum of ten dollars, to me paid by Francis B. McStocker, of said Honolulu, the receipt whereof is hereby acknowledged, and in further consideration of the undertaking by said Francis B. McStocker to organize a corporation to take over certain lands, leases and property now owned by the Kailua Sugar Co., a California corporation, and by myself, said property being situate in the district of North Kona, Island of Hawaii, and being part of the property conveyed to me by F. L. Dortch, receiver of the Kona Sugar Co. Ltd., by deed dated June 13th 1903, I do hereby give, grant, bargain sell, convey, assign, set
624 over and deliver unto the said Francis B. McStocker all of the following lands, leases and leaseholds therein described, personal property roads and franchises, viz:

"One. Lease from Queen Kapiolani to A. Fernandez and Frank Gouveia, dated September 14th 1892, for fifteen years, of the lands of Waiaha I and Kahului II, situate at North Kona, Island of Hawaii, and being recorded in the Registry of Deeds at Honolulu in Book 144 on page 269.

"Two. That certain lease from said Kapiolani to J. Coerper of lands in the ahupuaas of Waiaha I and Kahului II, dated April 13th 1895, for thirteen years with the privilege of extension for seventeen years more, and recorded in said Registry of Deeds in Book 156 on pages 29 and 30.

"Three. That certain confirmation by the Kapiolani Estate, Ltd., of said last named lease, dated January 31st, 1901.

"Four. All of that certain sugar mill, buildings, machinery, equipment, shops, tools, implements and appurtenances on, upon, about, or connected with or incidental to, the sugar manufacturing plant lately belonging to the Kona Sugar Co. Ltd., and sold to me as aforesaid by said F. L. Dortch, receiver as aforesaid.

"Five. All other lands, leases and leaseholds, personal property, rights, easements, privileges and appurtenances conveyed to me or intended so to be by the said F. L. Dortch, receiver as aforesaid, by the said deed aforesaid, and not heretofore assigned by me to C. J.

Falk or heretofore sold or assigned by me to J. R. Sloan by deed dated February the first, 1904.

625 "To have and to hold the said described property, together with all the rights, easements, privileges and appurtenances thereunto or to any part thereof belonging unto the said Francis B. McStocker, his heirs, executors, administrators and assigns, to their sole use and benefit and behoof forever.

"And I, the said Clinton J. Hutchins, both individually and as trustee, do hereby, for myself and my representatives and assigns, covenant with the said Francis B. McStocker, his heirs, executors, administrators and assigns, that I will forthwith cancel and cause to be cancelled by the Kailua Sugar Co. that certain agency agreement between the Kailua Sugar Co. and C. J. Hutchins and that certain planting and grinding agreement between the said Kailua Sugar Co. and Clinton J. Hutchins, both of said agreements being dated February the 14th 1904; that I am lawfully seized in fee of said property, other than said leases and said leaseholds; that I have good right to sell, convey, assign and deliver all of said described property as aforesaid; that the same are free from all incumbrances and that I am and my heirs, executors, administrators and assigns, warrant and defend the said property and each and every part thereof unto the said Francis B. McStocker, his heirs, executors, administrators and assigns, against the claims and demands of all persons.

"In witness whereof I have hereunto set my hand and seal this 7th day of November, A. D. 1905. Clinton J. Hutchins, Trustee, Clinton J. Hutchins." (Hands document back to witness.)

Q. Did you find the original of the deed from yourself to the Kona Development Co.?

626 A. I find that the articles of incorporation—the attorney who was handling the case considered that the charter was the original deed, and in the minute book is the copy, which is the only document I have got; it is in the minute book there if you will pass that up to the Judge, in the articles of incorporation you will see the certified copy there of my deed to the Kona Development Co.

Mr. WITHINGTON:

Q. What is this supposed to be,—a copy of the deed?

A. No, this is the—it is the articles of incorporation and this is a copy of those. It is all I have got, all I could find; what become of the other, whether it has got in the hands of the court at Kailua or what become of it I have lost record of it.

Mr. WITHINGTON: Irrespective of that fact I would like to suggest that under your Honor's ruling this clearly is inadmissible; this is not an act of Hutchins'.

Mr. ROBERTSON: We submit it is relevant, your Honor, in tracing the property, tracing the history of this property.

Mr. CATHCART: We object to it, as incompetent, irrelevant and immaterial; not responsive to any of the issues in this case.

(Objection sustained. Exception by plaintiff.)

Mr. ROBERTSON: We would like to have that book marked for identification and filed. If counsel will let me make a statement of what we offer? We offer in evidence deed dated the 4th day of April, 1906, executed by Francis B. McStocker, party of the first part, and the Kona Development Co. Ltd., party of the second part, wherein the party of the first part conveys to the party of the second part these matters: "First. All of those certain lands, tenements, hereditaments * * * (Reads) * * * conveyed to Francis B. McStocker by Clinton J. Hutchins, Trustee, and by Clinton J. Hutchins individually, by deed dated November the 7th 1905." The consideration of the conveyance being the covenants and agreements of the party of the second part herein contained and the sum of ten dollars to the said Francis B. McStocker paid by said Kona Development Co. Ltd., and of the issue and delivery to said Francis B. McStocker of 2,000 paid up shares of the capital stock of said Kona Development Co. Ltd. of the par value of \$100 per share, receipt whereof is acknowledged by the said McStocker.

The COURT: The jury will not consider this reading then as evidence. Forget all about it.

(No cross-examination.)

Mr. PROUTY: If your Honor pleases, in connection with the articles of incorporation of the plaintiff company I do not know that I have anything further to offer on that. I am quite confident that the exemplification we offered is admissible.

(Argument. The court takes an adjournment until ten o'clock tomorrow morning.)

628 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LTD., Plaintiff,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, etc., Defendants.

MAY 12, 1908.

(Argument on objections to articles of incorporation.)

The COURT: I will permit the instrument in evidence.

Mr. LEWIS: Note an exception.

Mr. ROBERTSON: Considered as read, Mr. Cathcart?

Mr. CATHCART: Yes.

Direct examination of GEORGE C. KUPA, called and sworn.

Mr. ROBERTSON:

Q. What is your occupation?

A. Clerk in the Registry office.

629 Q. That is in the Registry Office, Oahu?

A. Yes sir.

Q. Have you brought with you from the records of that office Volume 249?

A. Yes sir.

Q. Will you please turn to page 369. Do you find a deed there of F. L. Dortch to Clinton J. Hutchins, Trustee?

A. Yes sir.

Mr. ROBERTSON: We offer this in evidence, if the court please, and ask leave to read it into the record. This deed, your Honor, is referred to in Hutchins' deed to McStocker and consequently is required to — in the line of identifying the property.

Mr. CATHCART: We object to it on the same grounds we objected to that deed. We object to it as incompetent, irrelevant and immaterial; we object to it on the same grounds as we objected to the deed from Hutchins to McStocker, and take the ruling of the court and exception.

The COURT: Objection overruled.

Mr. LEWIS: Exception.

(The reporter afterwards wrote this out from Mr. Robertson's reading of it, and such transcript is filed in the papers in the case.)

(Plaintiff's Exhibit "JJ.")

630 Direct examination of J. M. McCHESNEY, called and sworn.

Mr. PROUTY:

Q. Mr. McChesney, what is your occupation, please?

A. Merchant.

Q. What is your occupation?

A. Merchant.

Q. Where do you reside?

A. In Honolulu, on Merchant street.

Q. You resided in Honolulu in 1901?

A. Yes sir.

Q. I hand you an instrument dated at Honolulu March 13th 1901 and purporting to be a conditional sale agreement——

Mr. WITHINGTON: Well now——

Mr. PROUTY:

Q. Or purporting to be a letter——

Mr. CATHCART: I would like to have the jury disregard what Mr. Prouty says.

The COURT: The instrument should speak for itself, Mr. Prouty.

Mr. PROUTY:

Q. Will you look at the instrument I hand you, dated March 13th 1901, marked Exhibit "B" (in replevin suit) and state whether you are the J. M. McChesney whose signature is appended to that instrument?

A. Yes sir, that is my signature.

Q. As President of the Kona Sugar Co. Ltd.?

A. Yes.

631 Q. And you were president of that company at that time, were you?

A. Yes sir.

Q. And you were present when the instrument was signed by the other party?

A. Yes sir.

Q. William W. Bierce, Ltd., by H. T. Gilbert, I believe?

A. Yes.

Mr. PROUTY: For the purpose of my examination of this witness I will offer this instrument referred to in his testimony in evidence.

Mr. CATHCART: We object to it as incompetent, irrelevant and immaterial.

Mr. PROUTY: I am not going to offer the other papers referred to in it, just that paper, for the purpose of laying a foundation for the examination of Mr. McChesney about the location of the property. I want to examine this witness briefly with reference to the purchase of the property; that is, the conditional purchase of it.

The COURT: You want to show then that there was a purchase of the property in question?

Mr. PROUTY: Yes.

The COURT: By McChesney & Co.?

Mr. PROUTY: Yes.

The COURT: From Bierce & Co.?

Mr. PROUTY: That is a conditional purchase, first. Yes. It is also to lay the foundation for—that is, it is in connection with certain other evidence that there has been no redelivery of the property to William W. Bierce, Ltd., by the defendant Hutchins,

or the sureties who are the defendants in this case.

632 The COURT: Well, I will permit it in evidence.

Mr. CATHCART: And exception, if the court please.

(Ex. "KK". Considered as read.)

Mr. PROUTY:

Q. Mr. McChesney, where, if you know, was the property mentioned and described in this agreement at the time it was executed on March 13th 1901?

A. It was in Honolulu, I believe; I believe it was in Honolulu at that time.

Q. You saw it, did you, at about that time?

A. Yes sir.

Q. And where was it located then?

A. On the wharf, near where the Inter-Island wharves are now, I believe.

Mr. WITHINGTON: Of course your Honor understands this is all under our general objection?

The COURT: Yes, I understand.

Mr. CATHCART: And exception.

Mr. PROUTY:

Q. After the execution of this agreement what was done with the property, if you know?

A. It was shipped to Kona, Kona plantation.

Q. In the Island of Hawaii?

A. Hawaii.

Q. Who took it over there,—the Kona Sugar Co.?

(Objected to as leading. Sustained.)

Mr. PROUTY:

Q. Well, who took it over?

The COURT: If you know.

A. You mean the vessel?

633 Mr. PROUTY:

Q. No, just what party?

A. Oh, well, the company, the Kona Sugar Co.

Q. And what did they do with it over there?

A. They took it to the plantation and laid a track with the rails and used the locomotives on the road.

Q. They also used the cane cars?

A. Yes sir, cars also.

Q. You mean the plantation railroad of the Kona Sugar Co.?

A. Yes; yes, the plantation railroad.

Q. You say that was in the District of Kona?

A. District of Kona, Island of Hawaii.

Q. When did you last see the property on that plantation?

A. About a year later.

Q. Haven't been there since?

A. What's that?

Q. Haven't been there since?

A. Not since this time a year later, no; 1902, I think, when I saw it last.

Cross-examination.

Mr. CATHCART:

Q. I show you, Mr. McChesney, a document dated Honolulu, Hawaiian Islands, February 21st, 1900, and marked "Exhibit 'A', 3 pages, R. C. S. Com'r." and ask you if you have ever seen that document before?

Mr. PROUTY: I object to the question as not cross-examination.

634 The COURT:

Q. Did you ever see it before?

A. Yes sir.

Mr. ROBERTSON: Also incompetent, irrelevant and immaterial; has no bearing on any issue in this case.

Mr. CATHCART: I haven't even offered it in evidence yet. I let them look at it.

Q. The instrument which you referred to in your direct examination, of date March 13th 1901, what material did that cover?

Mr. PROUTY: I object to that as calling for the contents of the

instrument and the instrument shows for itself what are its contents.

Mr. CATHCART: I will withdraw the question that I have asked, and ask the witness: if the instrument which he has just identified, of date March 21st 1900, is the instrument referred to in the document of date March 13th 1901, as being the letter dated February 21st 1900 from Bierce & Co. Ltd.?

A. What is the date of that other document?

Q. By letter dated February 21st 1900.

A. I believe it is, yes.

Q. Don't you know it is?

A. Yes.

Mr. CATHCART: Offer it in evidence, if the court pleases; ask it be marked.

(Objection by plaintiff; overruled; exception by plaintiff; considered as read in evidence.)

Q. At the time that the document of March 13th 1901 was executed and the property received by the Kona Sugar Co., there was present, was there not, Mr. Gilbert—wasn't that the
635 representative of the—

A. Yes.

Q. And Mr. Gilbert was the one who executed that document on behalf of the William W. Bierce Co. Ltd., was he not?

A. Yes sir.

Q. And Mr. Gilbert was very well acquainted with where that property was going to be placed, was he not?

Mr. PROUTY: I object to the question as calling for the personal knowledge of some one other than the witness, as calling for a conclusion that he was well acquainted.

The COURT: If you know, Mr. McChesney, you may answer the question. Objection overruled.

Mr. PROUTY: I object to the question further as not cross-examination.

The COURT: Answer the question if you can.

Mr. PROUTY: Exception.

A. Mr. Gilbert knew that the property was to go to Kona plantation.

(Motion by plaintiff to strike out answer as stating a conclusion of the witness' mind. Motion denied; exception.)

Mr. CATHCART:

Q. This instrument of March 13th 1901, being the instrument which was first shown you, can you state whether or not you or the Kona Sugar Co. ever had a copy of it?

(Objected to as irrelevant and immaterial, not proper cross-examination, having no bearing on any issue in the case. Objection overruled; exception by pl'ff.)

A. I couldn't say whether we took a—I took a copy or not. I——

Q. Do you remember when you saw this instrument again?

(Same objection same grounds.)

636 Mr. CATHCART: If the court please, it is cross examination to show his knowledge and familiarity.

(Objection overruled; exception by pl'ff.)

A. I don't recall seeing it since it was executed.

Q. Now in the purchase of these various matters that are set forth in the instrument of February 21st 1900 you acted, did you, for the purchaser, the Kona Sugar Co.?

A. Yes.

Q. And the party on the ground who was acting for Bierce & Co.—The first transaction was by means of letter, was it?

Mr. PROUTY: I object to the question as not stating the name of the party correctly; there is no Bierce & Co.

Mr. CATHCART: Well, William W. Bierce, Ltd., the first transaction in which this letter is written and the acceptance and all was by mail, or was anybody on the ground representing Bierce & Co.?

(Objected to as irrelevant and immaterial and not proper cross examination.)

The COURT: I will permit the question.

(Exception by pl'ff.)

A. There was another person here representing Bierce when the purchase was made.

Mr. CATHCART:

Q. Frank Davies?

A. Davies.

Q. He was in Honolulu when this letter signed by him was written, February 21st 1900?

A. Signed by him? Yes.

Q. Signed by William W. Bierce, Ltd., by Frank Davies?

A. Yes.

637 Q. And the transaction between you and William W. Bierce, Ltd., was for the purchase of this material that is set forth here, which constitutes a plantation railroad, doesn't it?

A. Yes.

Q. And did you not, in discussing the matter with Davies, state to him where your plantation was on which this railroad that you were buying was to be laid?

A. Yes.

(Motion by plaintiff to strike the answer out as incompetent, irrelevant and immaterial and not proper cross examination. Motion denied; exception by pl'ff.)

Q. And when the material arrived here and the final transaction was had with William W. Bierce, Ltd., through Mr. Gilbert, Mr.

Gilbert turned that over to you, did he, for the purpose of having it placed where you had told them it was to be placed?

(Objected to as calling for a conclusion, the mental process of Mr. Gilbert; not proper cross examination. Objection overruled; exception by pl'ff.)

Q. Can you answer the question?

A. I am not sure as I understand it exactly.

(Question read.)

A. Yes.

Q. And you thereupon took it and placed this plantation railway that had been sold to you on the plantation down in Kona?

A. Yes.

Q. In laying the rails of the railway on the lands there did you notify anyone on whose lands you laid it of the contents of the document of March 13th 1900-1901?

Mr. PROUTY: I object to the question.

638 The COURT: I fail to see where it is material or even cross examination; objection sustained.

Mr. CATHCART: Exception.

Q. It was taken down there by you after the settlement of March 13th 1901, and laid down on the Kona Sugar Co. property and treated as the property of the Kona Sugar Co., was it not?

A. Yes sir.

Q. Don't you know that Mr. Gilbert paid a visit to the plantation along in the last of 1901, and saw the railroad equipment, the railroad in its situs as it was there and the railroad equipment as you had laid it all down and were using it?

(Objected to as not cross examination and immaterial. Objection overruled.)

A. I heard that Mr. Gilbert——

(Exception by pl'ff.)

Q. Of your own knowledge I am asking.

A. I knew he had visited the plantation.

Q. You knew he visited the plantation, and was that subsequent to the time that the railroad had been laid in the plantation and was in operation there with its equipment?

A. A portion of it was laid at that time; I am not so sure whether all of the raild had been laid.

Mr. CATHCART: That's all.

639 Redirect examination.

Mr. PROUTY:

Q. You have referred to Mr. H. T. Gilbert and Frank Davies, representatives of William W. Bierce, Ltd., in cross examination; It is a fact, is it not, that they were only here temporarily and that Mr. Davies returned to the mainland shortly after the agreement of February 21st 1900 was executed?

A. Ye- sir.

Q. And Mr. Harry T. Gilbert returned to the mainland shortly after the execution of the agreement of March 13th 1901, did he not?

A. Ye- sir.

Q. And neither of them ever resided here?

A. No sir.

Q. And they have not been back here since, either of them, so far as you know, or did Mr. Gilbert or Mr. Davies ever return?

A. Mr. Davies made one visit.

Q. Did Mr. Gilbert?

A. Mr. Gilbert made two or three visits; I am not sure whether the last visit was at this time mentioned.

Q. Well—

A. I think that was the last visit.

Q. Yes.

Mr. CATHCART:

Q. That what?

A. I think that was his last visit to the islands.

640 Mr. PROUTY:

Q. When the agreement of March 13th 1901 was executed?

Mr. WITHINGTON: That is not what the witness said.

The COURT:

Q. Well, as long as there is a little confusion, if you will just make that straight?

A. Well, the visits to the plantation was in 1901, and this is March 13th 1901, why it must have been the second visit, a visit afterwards, after March. I can't say when his visit to the plantation was, that is as to the time.

Mr. PROUTY:

Q. Well, how did you know he visited the plantation?

A. He told me.

Q. When did he tell you?

A. Well, I am not sure; I am under the impression that it was—

Q. On the occasion of his last visit, was it?

A. Yes, and I am under the impression it was—just came here in the fall of 1901, after this contract was executed;—one visit after that.

Q. In the fall of 1901?

A. Yes sir.

Q. Well, has he been here since the fall of 1901?

A. I don't think so.

Q. What's that?

A. I don't think so.

Q. Yes. That's all.

Mr. ROBERTSON: If the court please, we ask leave to amend the amended complaint, on the first line on the 5th page, by striking out the — substituting the word thirty for twenty-two
641 and also striking out the words "together with interest thereon from the 19th day of March, 1904," so that paragraph will read, "the plaintiff has been damaged in the premises in the sum of \$30,000." We also ask leave to make a corresponding amendment to the prayer of the complaint, in the seventh line of the fifth page of the amended complaint, substituting the figures \$30,000 for \$22,000, and striking out the words "together with interest thereon from March 19th, 1904," in order to conform with the proof.

Mr. CATHCART: I thought he made the total \$28,154,—something like that.

The COURT: \$28,178.64.

Mr. PROUTY: That is satisfactory to us; put in the exact figures.

The COURT: I suppose you will have to be governed by the proof.

Mr. LEWIS: If your Honor please, I do not wish to be understood as consenting to any amendment whatsoever in the complaint.

The COURT: No, I understand, but you contend that, if the proof if anything, then it is \$28,000 and not \$30,000.

Mr. WITHINGTON: No, we contend that that would be the extent of it. We are going to contend that it does not show that.

Mr. ROBERTSON: So that our motion then is, instead of substituting 30 for 22 in the first and seventh lines of the fifth page, we ask leave to substitute \$28,156.74 instead of \$22,000.

Mr. LEWIS: I object to the amendment, if your Honor please, on the grounds that the amendment and every matter and
642 thing connected with the amendment has transpired since the institution and filing of the suit; that it is not permissible at this time to make such an amendment; that the complainant as amended must stand for and be considered as the amendment as of the date of the filing or consideration of the complaint; that these matters and things which they are now taking into consideration have happened subsequent to the filing of the complaint and subsequent to the time the judgment was given.

The COURT: That is, costs have accrued and interest has accrued?

Mr. LEWIS: Costs and various matters are not concerned with the cause of action as it existed at the time of the amended complaint and the claim so entered.

Mr. WITHINGTON: They cannot recover in this suit for a judgment which was obtained in another suit subsequently to the bringing of this action.

(Argument.)

The COURT: The amendment may be allowed by inserting \$28,156.74 in lieu of \$22,000.

Mr. LEWIS: Will your Honor give us an exception?

The COURT: Certainly.

Mr. PROUTY: That may be done by interlineation, if your Honor pleases.

(Notation made in margin.)

(Plaintiff rests.)

643 Mr. LEWIS: If your Honor pleases, at this time we desire to interpose a motion to strike out from the evidence in this case the creditor's claim introduced in this case, subscribed and sworn to September 6th 1904, purported to have been presented against the executors of the Waterhouse estate, and also claim number two, so called, purported to have been presented against the executors of the Waterhouse estate, subscribed and sworn to September 30th, 1904, and all evidence in this case relative to that proof, on the following grounds: That since the introduction of the evidence, with the claims and the evidence relating thereto, the deposition of Columbus Bierce on interrogatories has been read in evidence, and it appears from such evidence, given in answer to cross interrogatories, that the claim as introduced was subscribed and sworn to and presented by S. H. Derby, as attorney in fact for William W. Bierce, Ltd., both claims, one dated September 6th and one dated September 30th, 1904. The subscription is as follows: (Reads.) Mr. S. H. Derby was totally unauthorized to act for and as the attorney in fact of Columbus Bierce and consequently the actions of Mr. Derby were entirely unauthorized and cannot be held to be for and on behalf of or as the acts of William W. Bierce, Ltd., consequently the claim and all reference thereto should be stricken out.

The COURT: Motion denied.

Mr. LEWIS: Note an exception.

(Here the court takes a recess until 1:30 P. M.)

644 AFTERNOON SESSION, May 12th, 1908.

Mr. LEWIS: At this time, plaintiff having closed its case, I desire on behalf of the defendants William Waterhouse and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, to move for a non-suit on the following grounds.

First. The sureties, and particularly the sureties represented by William Waterhouse and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, and Mr. Waterhouse, particularly applying to Mr. Henry Waterhouse in his lifetime, having executed a redelivery bond conditioned on the affidavit of plaintiff in the replevin action, and the complaint of plaintiff setting forth the actual value of the property sought to be replevined at \$15,000, and the fact that the complaint in said replevin action was thereafter amended to show, first the actual value of \$20,000, and, second, said complaint was thereafter again amended in said action to show a value of \$22,000, and the judgment in said action thereafter rendered for \$22,000, the

surety was thereby released by said amendments under the circumstances.

Second. The cause of action alleged in the complaint in the replevin action at the time of the execution and delivery of the redelivery bond was by subsequent events changed and judgment was rendered on the amended cause of action, the sureties thereby released.

Third. The property sought to be replevined had not been seized by the sheriff according to the statute at the time of
645 the delivery of the redelivery bond, and the sureties consequently not liable under the bond.

Fourth. The judgment of May 6th, 1905, by the supreme court of the Territory of Hawaii in the replevin action of Bierce against C. J. Hutchins, trustee, released the defendant sureties in this action.

Fifth. If such judgment did not release the sureties, then such judgment at least makes the commencement of this action on the bond premature.

Sixth. Or at least shows that no proof has been introduced by plaintiff's testimony showing breach of conditions of bond by defendant Hutchins, trustee.

Seventh. This action on the bond cannot be maintained as no claim has been presented to or suit brought against the executors under the will and of the estate of Henry Waterhouse, deceased, according to the statute relative to claims against the estates of decedents.

Eighth. This action on the bond is prematurely brought against the executors under the will and of the estate of Henry Waterhouse, deceased.

Ninth. This action was prematurely brought against all parties defendant.

Tenth. The sureties are released by change of venue from the third circuit to the first circuit court of the Territory of Hawaii without the consent of the sureties in the replevin action of Bierce against Hutchins, trustee.

Eleventh. The sureties are released by waiver of a jury trial by plaintiff in the replevin action of Bierce, Ltd., against Hutchins, trustee.

Twelfth. The surety represented by the executors under
646 the will and of the estate of Henry Waterhouse, deceased, is released by the discontinuance of this case as to C. J. Hutchins, trustee, and A. B. Wood.

(Argument.)

647 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LTD., Plaintiff,

vs.

WILLIAM WATERHOUSE et al, etc., Defendants.

MAY 13, 1908.

(Continuation of argument.)

Mr. LEWIS: I desire to amend one of the grounds of the motion for nonsuit to read as follows: No. 4. The decision of January 28th, 1905, of the supreme court of the Territory of Hawaii in the case of Bierce versus Hutchins, trustee, being the replevin suit, and, or, the judgment of May sixth 1905 of the supreme court of the Territory of Hawaii in said suit released the defendant sureties; and also desire to add the following grounds that have been covered by argument: The sureties are not bound by any act or proceeding had by virtue of the amendments of March 3rd, 1905, of the Organic Act.

The COURT: The motion for a non-suit is denied.

Mr. LEWIS: We note an exception to the denying of the non-suit.

(Mr. Cathcart makes opening statement for defendants.)

648 Direct examination of JOHN W. CATHCART, called and sworn.

Mr. WITHINGTON:

Q. What is your name, residence and occupation?

A. John W. Cathcart, Honolulu, attorney at law.

Q. What connection, if any, did you have, and when did it arise, in the action of William W. Bierce, Ltd., versus Clinton J. Hutchins, trustee, which has been testified to in this case?

A. I was attorney for Clinton J. Hutchins, trustee, the defendant, from the inception of the action, from the beginning of the action.

Q. Had you had any knowledge of the property before that time?

A. Yes; yes, I had known the property for some—let me see, six months before, I should think.

Q. Been to Kona?

A. O yes, I had known that property more than that. I was down in Kona in 1900—in June, 1902, and knew about the property then, but not to the same extent that I did know it along about six months prior to the commencement of the action?

Q. What was your knowledge of it or familiarity with it just prior to the commencement of the action?

Mr. PROUTY: I object to the question, if your Honor please.

The COURT: For the purpose of identifying the property?

Mr. WITHINGTON: Yes, the conditions.

649 The COURT: Objection overruled.

A. Along in the spring of 1903, or rather in the winter, I went down there to look over the condition of affairs in the receivership suit and the property, with the idea of seeing whether or not it would be possible to save the property in any way for Mr. Hutchins or Mr. Scott. They were acting—they had come to me about the matter. I wanted to examine into the receivership suit and also to see the property.

Mr. WITHINGTON:

Q. Now at the time the action was brought, state in a general way the location and the condition of the property.

The COURT: You mean the replevin suit?

Mr. WITHINGTON: Yes, the replevin action. For the purpose of showing what we offered to return.

A. There was a plantation railroad. The rails were laid along over—through the plantation there on the right of way on the—I forget what they technically call it; there was an embankment throughout the cuts and there the rails were laid; the cars and the locomotives were all there at the plantation, on the ground there.

Q. Now if you will state what your first knowledge was of the suit and what was done,—and I call your attention particularly in connection with this to Exhibit "D", the replevin bond, and the return bond, plaintiff's Exhibit "B".

A. When the action was brought the papers were turned over to me by Mr. Hutchins—

Mr. PROUTY: Well now, I object to that statement, that those papers were turned over by Mr. Hutchins.

A. I don't say these papers were turned over to me; I say
650 when the action was brought the papers were turned over to me, meaning by that the copy of the complaint and the copy of the summons which had been served on Mr. Hutchins when this action was commenced.

Mr. PROUTY: Well, that isn't in question in this suit at all.

The COURT: Well, it is preliminary, I suppose. Objection overruled.

Mr. PROUTY: We note an exception.

A. And I don't remember whether it was the same day or whether it was the next day, but I learned of the high sheriff here having a writ of replevin—

Mr. PROUTY: I move to strike out the statement that he learned that the high sheriff had a writ of replevin, as stating a conclusion and hearsay.

(Objection overruled; exception by p'lff.)

The COURT: The witness being an attorney, I will caution him against giving hearsay evidence.

The WITNESS: Yes, your Honor, I will be very careful. And he had it here in Honolulu. The property was down in Kona; we were operating it, and we didn't want it taken out of our hands, so

I arranged with him to give a return bond here for the property and for him not to take the property into his possession except the formal seizure of it that might be necessary.

Mr. PROUTY: I move to strike out the answer, or so much thereof as relates to what the witness states he arranged with the sheriff in the matter of taking a return bond, and I make that objection on the ground that the return bond, so far as we are concerned, is
651 filed here duly and regularly, speaks for itself and is a part of the record and is conclusive of the fact of the levy on the property by the sheriff.

(Objection overruled; exception by pl'ff.)

A. After that arrangement this return bond which is in evidence here was given to the high sheriff, and given to him on the day that it is dated and the day that it is approved.

Mr. WITHINGTON:

Q. Now after the order for an execution, which has been put in evidence here—I am not sure; I think that is in the minutes; I think it is April 8th—

The COURT: I think there was a formal order signed.

Mr. CATHCART: Yes, a formal order.

Mr. WITHINGTON: For the issue of the execution. Well, I only want the date. I think it is April 8th. The execution was issued on the 15th but the order was the 8th.

Q. Will you state whether you were still acting for the defendant in the action.

A. Yes, I had been his attorney from the beginning up to this—very end; one of them.

Q. What first transpired, that you recall, about the execution or the order for the execution; what first came to your knowledge?

(Objected to as calling for a conclusion. Objection overruled.)

Q. What first occurred with reference to it that you now recall?

Mr. PROUTY: In reference to what?

The COURT: You mean prior to or subsequent to the order?

A. Well, the first—

652 Mr. WITHINGTON: Subsequent to the order.

Mr. PROUTY: I object to that, because the record is conclusive; the record imports absolute verity and is conclusive on the parties.

The COURT: Objection overruled.

Mr. PROUTY: I would like to except to the ruling.

A. Am not sure now whether the first thing that we—that occurred in reference to this property after that was the demand, the written demand of Kinney, McClanahan & Cooper, or my and Mr. Hutchins' conversation with him up in his office. It was—they were about the same time and I couldn't say which was the first; I am

inclined to think that the—I am inclined to think the demand was made there first, though.

Mr. WITHINGTON:

Q. You spoke of a written demand. I show you this paper, dated April 18th, 1904, and ask if that is the document to which you refer?

A. Yes, that is the document.

Q. In whose handwriting is the endorsement on that and by whom made?

A. That is my handwriting; it was made by me at the time this was—

Mr. WITHINGTON: I intend to offer it in evidence. (Handing to counsel.)

Mr. PROUTY: Well, I have inspected it, Mr. Withington.

Mr. WITHINGTON:

Q. Know the signature? (Showing document.)

A. Yes, I have seen that before, Kinney, McClanahan & Cooper and E. B. M.

Q. Whose signature is that?

A. Well, the—it is a stamp, and then these initials are 653 those of McClanahan, E. B. McClanahan.

Q. His handwriting?

A. Yes.

Mr. WITHINGTON: We offer it.

Mr. PROUTY: I wish to object to it as incompetent, irrelevant and immaterial, and on the ground also that the paper—it has not been shown who received the paper, from whom it was received, or when it was received, and further on the ground that this is incompetent for the purpose of proving a return of the property in question, and on the ground that it is incompetent for the purpose of contradicting the record; the record cannot be contradicted.

The COURT: You refer particularly to the return to the execution?

Mr. PROUTY: The return to the execution.

Mr. WITHINGTON: We intend to follow it up by other—

(Objection overruled; exception by pl'ff.)

(Instrument read. Defendant's Ex. "2.")

Q. Mr. Catheart, do you know whether any response was made to this demand?

A. There was a response in writing.

Q. I show you an instrument dated April 18th 1904 and ask you if that was the response, or a copy of the same?

A. This is a—this is a copy.

Q. Carbon copy?

A. Carbon copy.

Mr. WITHINGTON: Have you the original?

Mr. ROBERTSON: Yes. (Hands to Withington.)

Mr. WITHINGTON: We offer——

The WITNESS: Let me look at that. (Looks.) That is the original.

654 Q. Whose signature is that which is signed to the letter?

A. That is Clinton J. Hutchins, Trustee.

Mr. WITHINGTON: We offer it.

Mr. PROUTY: I object to it, if your Honor please, on the ground that it does not tend to prove a return of the property or a tender and that it was delivered at the—I presume—at the time it bears date.

The COURT:

Q. Is that the fact, Mr. Cathcart?

A. Yes, it was.

Mr. PROUTY: And that is April 18th 1904, while the execution issued in the replevin suit was outstanding, the same having been issued April 15th, and is incompetent for the purpose of impeaching the officer's return of execution.

(Objection overruled; exception by pl'ff. Defendants' Exhibit "3." Read.)

Mr. WITHINGTON:

Q. You have spoken, Mr. Cathcart, about an interview in which yourself and Mr. Hutchins and Mr. McClanahan were present——

A. McClanahan——

Q. Will you state what took place there.

Mr. PROUTY: I object to it because the question does not call for the time and place.

(Objection overruled; exception by pl'ff.)

A. After the reading of that demand I see that the interview took place subsequent, after the demand was made Mr. Hutchins and I——

The COURT:

Q. And prior to the return of the officer?

655 A. O yes. On the same day that we received the demand, April 18th, and I think it was in the morning, right after receiving the demand we went over to Mr. McClanahan's office and——It was in the Judd building, and there I wanted to see the execution, the writ, which was in their possession, but he wouldn't show it to me, but he told me that the threat contained in that demand would be carried out and Hutchins' office furniture would be seized unless immediate payment was made of that \$1189. Well, on that same day the amount was paid. I don't remember any particular conversation that we had in reference to the—to any other matters at that time.

Mr. WITHINGTON:

Q. When you refer to the \$1189 you refer to the amount specified in Exhibit "2"?

A. Yes; that is, the damages and costs.

Q. \$1198.20?

A. That's it, \$1198.20.

Q. And to whom was that paid?

A. That was paid to McClanahan.

Q. On that day?

A. On that day.

Q. Was anything further done about that time?

A. Well, not at that interview. The same day the—this exhibit was delivered over to him.

Q. You think that was after the interview?

A. Yes, that was after the interview.

Q. Defendant's Exhibit "3" was delivered after this interview. Do you know whether any response was received to defendant's Exhibit "3", the offer of the property?

A. Yes.

Q. I show you a letter dated April 21st 1904 and ask you
656 if you can identify this letter and know the signature?

A. Yes, this is the letter that was received in response to our offer. I know the signature, Kinney, McClanahan & Cooper.

Q. By—

A. By E. B. McClanahan.

Mr. WITHINGTON: We will ask that this be received in evidence and marked Defendant's Exhibit "4".

The COURT: It is so ordered.

Mr. PROUTY: Well, I object to it, if your Honor pleases.

Mr. WITHINGTON: I suppose the same objection might apply to all these.

Mr. PROUTY: On the same grounds stated, incompetent, irrelevant and immaterial.

The COURT: So understood and exception will be allowed.

Mr. PROUTY: And as not admissible to prove return or tender of the property or to impeach the return on the execution.

The COURT: Read the exhibit.

(Exception by pl'ff.)

Mr. WITHINGTON: And will you kindly produce a letter of May 18th 1904, from Mr. Hutchins to Messrs. Kinney, McClanahan & Cooper, of which you have the original.

Mr. ROBERTSON: May 18th. We haven't got it. We have May 26th and 27th but not May 18th.

Mr. WITHINGTON:

Q. When did you next have any transaction, or what next transpired in regard to this matter, Mr. Cathcart, that you can recall?

A. It was some time later that we received another communication, I think, similar communication of Kinney,
657 McClanahan & Cooper, the attorneys.

Q. Will you examine this letter of May 16th 1904 and say whether that is the letter to which you have reference and whether—

A. Yes, that is the next communication.

Q. —it is signed?

A. May 16th, 1904; signed Kinney, McClanahan & Cooper by E. B. M.,—their signature.

Mr. PROUTY: May it please your Honor, I desire to object to the letter of May 16th 1904.

The COURT: On the same grounds as the others? It is the same correspondence.

Mr. PROUTY: Yes sir, on the same grounds.

The COURT: The objection overruled.

(Objection withdrawn.)

Mr. WITHINGTON: I will ask this be Defendant's Exhibit "5".

(Reads.)

Now will you kindly produce letter of Cathcart & Milverton of May 26th, 1904, and the enclosure being letter of M. F. Scott; the one that I asked under the name of Hutchins, the enclosure is the letter of Scott's.

Mr. ROBERTSON: I guess that's it, dated May 18th.

Mr. WITHINGTON:

Q. I show you a letter, May 26th 1904, and ask whether that is in answer to the defendant's Exhibit "5" and whether the letter signed by Mr. Scott, which I hand to you, was enclosed?

A. That is the letter that we wrote in reply to the letter you have just read, and enclosed with this letter that is written by Mr. Scott.

658 Mr. WITHINGTON: We offer the letter and enclosure and ask to have it marked Defendant's Exhibit "6" and "7," or Defendant's "6"; put it together, perhaps.

The COURT: "6" and "6a"; that will show that they go together.

Mr. PROUTY: I desire to object to the letter of May 26th, as Exhibit "6," as incompetent, irrelevant and immaterial and because it purports to be written by Cathcart and Milverton as attorneys for C. J. Hutchins, Trustee, and it does not appear that they were authorized to write such a letter.

I also object to the other offer, of Exhibit "6a," on the ground that the letter that Mr. Scott wrote to Kinney, McClanahan & Cooper is in no way evidence in this case, and the return of the property by the defendant was—or offer to return it, is immaterial in the case for any purpose, and I object to both of them on the further ground that it is incompetent to use them for the purpose of contradicting the return on the execution, or showing a return of the property.

The COURT:

Q. As I understand, Mr. Scott had actual control or possession of the property as agent of Mr. Hutchins?

A. These are in reply to letters received.

Mr. PROUTY: I move to strike out the statement that they are in reply to the letter last mentioned. They show on their face what they are.

(Motion denied; exception by pl'ff.)

Mr. WITHINGTON:

Q. What authority did Cathcart & Milverton have, if any, to act for C. J. Hutchins in reference to this, and how came you to reply to the letter of Messrs. Kinney, McClanahan & Cooper to Clinton J. Hutchins, Trustee, of May 16th, Defendant's Exhibit "5"?

A. We were requested to reply to it by Mr. Hutchins.

The COURT: I think it may be received in evidence. Objection overruled.

(Exception by pl'ff.)

(Letters read.)

Mr. WITHINGTON: In pursuance of our desire to put in the whole correspondence I show you a letter of May 27th 1904 and ask you if you recognize that and know whether it has any connection with the last exhibit?

A. This is a letter of date May 27th 1904, signed by Kinney, McClanahan & Cooper, and in reply to the letter that I last wrote, that you just read.

Mr. WITHINGTON: We offer it in evidence and ask it be marked Defendant's Exhibit "7."

Mr. PROUTY: No objection to this, if your Honor please.

(Read.)

Mr. WITHINGTON:

Q. Now will you kindly produce the letter which I—I show you a letter, May 27th 1904, and ask whether that is a reply to the last letter?

A. That is the reply.

Mr. WITHINGTON: I offer this in evidence and ask to have it marked Defendant's Exhibit "8."

Mr. PROUTY:

Q. I understand you were authorized by Mr. Hutchins to make this reply

A. Well, the letter is directed to me, that which was just read in evidence, directed to the firm of Cathcart & Milverton; I didn't need any authorization to reply to a letter—

Q. I mean to write the letter, Exhibit "7" to which this
660 is a reply, Kinney, McClanahan & Cooper, by Derby, wrote the—

A. Last letter that has been read?

Q. No, but this is the letter from Cathcart & Milverton. I am asking you if you were authorized—

A. No, I am saying that the letter that was last read in evidence is a letter directed to Cathcart & Milverton and this is a reply to it.

Q. I see, yes.

Mr. PROUTY: I object to this, if your Honor please, as incompetent, irrelevant and immaterial, and particularly on the ground that it does not tend to prove a return of the property in question

or a valid tender of it, and also because it is inadmissible for the purpose of impeaching the return on the execution.

The COURT: I suppose it completes the correspondence?

Mr. WITHINGTON: Yes.

(Objection overruled; exception by pl'ff.)

Q. Did that complete the correspondence, Mr. Cathcart?

A. Yes, I know of nothing more.

Q. As far as you know that is the entire transaction?

A. So far as I know.

Q. I believe that is all.

A. Well—

Mr. PROUTY: Now wait a minute. I object to any remarks from—

The WITNESS: Any volunteering?

Mr. PROUTY: —from the witness.

(Objection overruled; exception by pl'ff. Witness consults with Mr. Withington.)

Mr. WITHINGTON:

Q. Mr. Cathcart, in these letters, both from Messrs. Kinney
661 McClanahan & Cooper and from Mr. Hutchins as Trustee,
and from Cathcart & Milverton, reference has been made
to Mr. Scott's acting for Mr. Hutchins. If you know anything
about his authority and how he was acting I wish you would state.

A. Well, he had—I do know. Do you want to make any—do
you want to object? (To Mr. Prouty) I won't go on.

Mr. PROUTY: I don't object so far, Mr.—

Mr. WITHINGTON: Wait a minute. If there is any objection—

The COURT: The objection should be to the question and not to
the answer.

Mr. WITHINGTON: I object to their moving to strike out upon any
grounds which they might have raised at the time.

Mr. PROUTY: I understand the question has been answered.

The WITNESS: O no, only a part of it. I know that Mr. Scott
had authority to act for Mr. Hutchins in Kona in and about the
plantation that was down there, including this property in question.

Mr. PROUTY: I object to the witness making any statement of
what the authority was.

A. I was asked what it was.

Mr. WITHINGTON:

Q. Well, state what that authority was.

Mr. PROUTY: I object to that, if your Honor pleases, as immaterial
and incompetent.

(Question withdrawn.)

Mr. PROUTY: I move to strike out the answer of the witness that
he knew that Mr. Scott had the authority referred to, on the
ground that it is incompetent, irrelevant and immaterial for any

purpose; what this witness knew about Mr. Scott's authority is not in issue here and couldn't be on any ground.

662 The Court: The reference to Mr. Scott in the letters I think is pertinent. The motion to strike will be denied. (Exception by pl'ff.)

Cross-examination of J. W. CATHCART.

Mr. PROUTY:

Q. Mr. Cathcart, you say you were the attorney for Clinton J. Hutchins, Trustee, in this replevin suit, were you?

A. I was.

Q. How long were you his attorney?

A. In the replevin suit?

A. Yes.

A. I am still acting as his attorney in the replevin suit, have been ever since the commencement of the action.

Q. Well, you represented him in this court during the trial of the case, didn't you?

A. Of the replevin case, I did.

Q. And in the supreme court of the Territory?

A. Yes.

Q. Didn't represent him in the Supreme Court of the United States?

A. I went on, but the case was postponed and I had to come back, and I didn't represent him.

Q. You were not his attorney in the Supreme Court?

A. Yes, I was his attorney on the brief; I didn't actually participate in the argument but I was attorney on the brief.

663 Q. When did you first go up to North Kona to examine this property in question?

A. It was—I can't state positively; I think it was early in 1903, early in—sometime early in 1903; that is when I went up to examine the records of the court in the receivership suit and the property.

Q. Anybody go with you?

A. No, I went alone.

Q. Did you go onto the railroad and examine it?

A. Yes, I went onto the railroad.

Q. You saw that the track was laid on a grade there, on ties like any railroad track?

A. Yes.

Q. And the locomotives and cane cars were located on this track, were they?

A. Well, they were, some on the track, I think some in—on—at the mill; I don't remember exactly where they were particularly located.

Q. There were sheds there, locomotive sheds and car sheds at the mill?

A. Yes.

Q. Over the track?

A. Yes.

Q. And the track ran from the mill out onto the plantation, over the plantation?

A. Yes.

Q. Is that true?

A. Track ran through the mill out over the plantation.

Q. Yes.

A. Yes.

664 Q. And how far did you go over the track from the mill?
A. Oh, I couldn't state; I didn't go—I struck the track at different points; I don't suppose more than two or three miles, say.

Q. Did you rise out on this railroad?

A. No, I didn't ride on the railroad; I was on horseback through there.

Q. Is that the only time you were up there?

A. Oh, I have been up there many times before and since; that was the only time that I went particularly along the railroad track or into the mill. I don't—I have been on the railroad track of course since and before, but I have no—

Q. When were you there the last time?

A. The last time, January of 1905, January term of court down at Kailua.

Q. You testified to a lot of conversation that you had with Mr. McClanahan when you went to his office in the Judd building, or the office of Kinney, McClanahan & Cooper, and he made demand for \$1198.20 under the execution.

A. Whatever the amount was he made demand for it.

Q. Yes. Who accompanied you on that occasion?

A. Hutchins.

Q. Anybody else present at the conversation?

A. No, McClanahan, Hutchins and I, and I think it was a room that—occupied by Cooper.

Q. It was in a room occupied by Cooper?

A. Room—in Cooper's room, but nobody was there at the time but McClanahan and Hutchins and I.

Q. McClanahan and Hutchins and you were the only parties present?

A. Only parties present.

665 Q. Any other parties in hearing during that conversation?

A. Oh, I don't think so; the door was closed.

Q. Where is Clinton J. Hutchins now?

A. He is in San Francisco, or is on the water; he left not long ago.

Q. When?

A. I couldn't tell you now what day it was.

Q. A week ago or two, a week ago?

A. Yes, not long ago. Well, a week ago is the commencement of the suit, isn't it? The suit was commenced Thursday, I think it was a week previous to that, I think it was; that would be the first week in May.

Q. And after this case was set for trial, wasn't it? After this case was set for trial that he started?

A. Yes, I think it was.

Q. For San Francisco?

A. I think the case was set for trial on April 28th and I think he left a couple of days afterwards, but I ain't sure.

Q. He left on the Nevadan?

A. Well, I don't know; I didn't see him before he went at all; I haven't *seen* him to speak to him for three weeks or a month.

Q. The conversation you referred to in your testimony, is that the only one that you had with any member of the firm of Kinney, McClanahan & Cooper?

A. The conversation?

Q. Is that the only conversation you had with any member of the firm of Kinney, McClanahan & Cooper with reference to the subject of returning the property in question?

A. No, I think we had many a conversation, but I don't
666 remember when, anything about it; I can recollect Mr.

McClanahan was over into my office a number of times, quite a number of times, but I can't remember or recollect a single thing that occurred between us.

Q. Was that after this first conversation you have mentioned?

A. Yes.

Q. And during the period covered by this correspondence mentioned in your testimony?

A. Well, he was not over much during that time, but subsequent to that he was over. I think he was sick there for some little time during the period covered by this correspondence, and I think I went over to his office two or three times.

Q. During the period covered by this correspondence?

A. Yes, during the period; I don't think I was there much afterwards, I went over there for the purpose of seeing that execution, if I could get it.

Q. Do you remember whether you talked with anybody about it besides Mr. McClanahan?

A. No, I don't remember; Derby and he were the only ones that seemed to have anything to do with it at that time; he may have talked with Derby, but McClanahan was the person that did all the talking.

Q. Didn't talk with Judge Cooper about it?

A. No, I didn't see Cooper; I don't think I ever spoke a word, either before or since, to Judge Cooper about it.

Q. You mean Henry E. Cooper?

A. Henry E. Cooper; neither before nor since, to my recollection did I ever speak a word, excepting he informed me of the passage of that amendment to the Organic Act.

Q. Now in your letter, identified as Defendant's Exhibit
667 "8", dated May 27th 1904, you state as follows: "As we have long since turned over this property to you under the execution, on your demand, precisely as we received it, you will pardon us if we were unable to see the great importance of an early reply to your letter of the 16th inst." As I understand it, that sentence refers to the sending of the written demand—or written offer

of the property which has been introduced here as—"Your letter", that refers to your letter of—or to Hutchins' letter of April 18th to Kinney, McClanahan & Cooper, offered as—

A. Let me see that—

Q. —Defendant's Exhibit "3"?

A. —letter that you have just quoted from, will you, please?

Q. Yes. (Hands to witness.)

A. I presume that special reference this—in this clause that you have cited, this paragraph you have cited, I suppose that the special reference was to the turning over by the letter of April the 18th, 1904, although at that time he must have known of the transaction that took place down on the land at Kona.

Mr. PROUTY: I move to strike out so much of the answer as states, "although at that time he must have known of the transaction which took place down at the land at Kona", as unresponsive to the question.

A. I say—

Mr. PROUTY: I object; wait a moment.

The COURT: As it stands I think that it is not responsive.

Mr. LEWIS: Will your Honor hear me a moment?

The COURT: There is no use of arguing immaterial matter like that.

668 Mr. LEWIS: It is most important.

The COURT: Motion to strike is granted.

Mr. LEWIS: Will the record show, for counsel for defendant, that the court refuses to let us argue our objection?

The COURT: The record will show it.

Mr. PROUTY:

Q. Mr. Cathcart, didn't you receive other letters from Kinney, McClanahan & Cooper with reference to the replevin suit?

Mr. WITHINGTON: I think you ought to at least call the attention of the witness to the letters or dates in some way, or show that you have them, before—

Mr. PROUTY:

Q. Either written directly to you or to your firm or to Mr. Clinton J. Hutchins, Trustee, other than those you have offered in evidence or mentioned in your evidence?

Mr. LEWIS: I object to that, your Honor, as being irrelevant, incompetent, and immaterial, and indefinite as to time; might have been a year afterwards or *might have been a year afterwards* or might have been a year before that time.

The COURT: I will permit the question as it seems to be preliminary in its nature. You may answer the question.

Mr. LEWIS: Note an exception.

A. Not to my recollection; these letters were all together; I have searched the files and everything to see if there were any other letters; I can find no more, but it is true that since this transaction I—

my offices were moved and it is possible I have received some letters which were lost or mislaid, but I have no recollection of ever having received any other letters in reference to this particular matter from them.

669 Mr. PROUTY:

Q. This correspondence that you had and which you have mentioned in your testimony was had before the hearing of the replevin suit in the supreme court of the Territory here, was it not?

A. Before the—O yes.

Q. Yes.

A. I think that hearing in the supreme court was in November or December of that year.

Q. Didn't you as a matter of fact have negotiations with Mr. McClanahan subsequent to the last letter which you have offered in evidence here as Exhibit "8," and which is dated May 27th 1904?

Mr. WITHINGTON: That is not cross examination.

Mr. LEWIS: Incompetent, irrelevant and immaterial and not proper cross examination.

Mr. PROUTY: Wait a minute.

Q. Well, didn't you have conversations with Mr. McClanahan about a settlement of the Bierce case?

Mr. LEWIS: I object to that as incompetent, irrelevant and immaterial.

The COURT: Subsequent to the correspondence in evidence?

Mr. PROUTY: Subsequent to the correspondence.

A. About a settlement?

(Argument.)

The COURT: Objection overruled.

Mr. LEWIS: We except.

Mr. PROUTY:

Q. Whether or not there was any conversation with Mr. McClanahan subsequent to the correspondence now in evidence?

A. Whether there was any conversation had with him—

670 Q. With reference to this—

A. Oh, I have had—

Mr. LEWIS: On the further ground it is indefinite. The conversation about what?

The COURT: I understood him to use the word "settlement."

A. Settlement?

Mr. PROUTY: Yes.

A. Really I couldn't say; I undoubtedly had conversations with him; about what I couldn't say.

Q. Isn't it a fact that, in behalf of your client Clinton J. Hutchins, you submitted an offer of settlement of this case?

Mr. WITHINGTON: Well now, we object to that as incompetent,

irrelevant and immaterial, an offer of settlement in the replevin case when it was pending in the supreme court.

The COURT: Sometimes the supreme court cases are dropped.

Mr. CATHCART: Yes, but it is privileged, if the court pleases.

(Objection sustained; exception by pl'ff.)

(Here the court takes an adjournment to tomorrow morning.)

671 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WM. W. BIERCE, LTD., Plaintiff

vs.

WILLIAM WATERHOUSE, et al., etc., Defendants.

MAY 14th, 1908.

Cross-examination of JOHN W. CATHCART, resumed.

Mr. PROUTY:

Q. Mr. Cathcart, referring to Defendant's Exhibit "3," being letter from Clinton J. Hutchins, Trustee, to Kinney, McClanahan & Cooper, dated April 18th 1904, I understand you to say that that letter was delivered to Kinney, McClanahan & Cooper at their office here in the Judd Building in Honolulu on the day it bears date?

A. Yes.

Q. Was it sent over from your office to theirs?

672 A. I think it was.

Q. Yes; prepared by you, was it; dictated by you?

A. Prepared by me, yes.

Q. But signed by Mr. Hutchins himself?

A. Yes, it was, it was prepared by me—it was either prepared by me or by Milverton, who was my partner at that time.

Q. During the months of April and May 1904, covered by this correspondence, where did Mr. Hutchins reside, if you know?

A. In Honolulu.

Q. And what business was he engaged in in Honolulu?

A. He was general agent for the Pacific Mutual Life Insurance Co.—I think that is the name of the company.

Q. Did he have an office in Honolulu?

A. He had.

Q. And he was not engaged in the sugar business, was he?

A. In what?

Q. He was not a sugar factor or engaged in the business of the production of raw sugar?

A. No, I don't think that you could say that he was.

Q. Up to the time when he became interested in this property?

A. He was not what is known as a sugar factor; that is to say, I think he had more or less connection with the plantations before that, in the way of ownership of stock and things like that, but he was not a sugar factor as we know them.

Q. Well, do you know of any instance of his ownership of stock

in any other plantation or sugar company, prior to his becoming interested in this property?

673 A. I can't say that I know that, no; I have merely an impression that I had that he—most everybody owned stock that had a dollar or two.

Mr. PROUTY: I move to strike out that answer, the "impression I have most everybody here owned stock, sugar stock." That is not responsive to the question.

The COURT: It may — stricken out and not considered.

Mr. PROUTY:

Q. Mr. Cathcart, I now show you a letter-press copy of a letter purporting to be by Kinney, McClanahan & Cooper to Clinton J. Hutchins, Trustee, dated April 26th 1904——

A. 1904?

Q. April 26th, 1904, yes, and ask you if you know whether Mr. Hutchins received the original of that letter?

A. I think I remember seeing such a letter.

Q. Have you the original of that letter?

A. No I have not; I don't think I ever had the original; I think I saw it in Mr. Hutchins' office.

Q. In Mr. Hutchins' what?

A. Office.

Q. Didn't he turn over to you all his papers pertaining to the matter of this litigation?

A. Yes, he turned over all the papers that bore on this litigation.

Mr. PROUTY: I offer the copy in evidence, — your Honor please. (Mr. Lewis steps up to speak to the witness, Mr. Cathcart.)

Mr. PROUTY: If your Honor please, I object to counsel examining the witness, unless it is done openly before the jury.

The COURT: I think it is improper.

674 The WITNESS: I am one of the attorneys in the case, your Honor.

The COURT: That does not make any difference. You cease to be the attorney when you are on the witness stand, as I understand it. I don't think there should be any consultation between the attorneys and witness, any secret consultation; I don't think it is proper. Whenever a party takes the stand, no matter what his capacity in the case may have been before, that capacity ceases for the time being and he becomes a witness.

Mr. LEWIS: We note an exception.

The COURT: How does this date compare with the date of the other correspondence? Is it part of that or subsequent to that?

Mr. ROBERTSON: Yes, your Honor, other letters both before and after that, April 18th and May 26th and 27th and 16th.

The COURT: You say you object to it.

Mr. WITHINGTON: It is incompetent, irrelevant and immaterial and does not relate to any matter involved in this suit but seems to relate to some attempted compromise.

The COURT: Well, the letter itself says without prejudice, but as a part of the correspondence, objection overruled.

Mr. WITHINGTON: Exception.

Mr. PROUTY: I ask that it be identified as Plaintiff's Exhibit double "L."

The COURT: So ordered.

(Exhibit read.)

Mr. PROUTY:

Q. Mr. Cathcart, I show you a letter-press copy of a letter purporting to be by Kinney, McClanahan & Cooper, attorneys for William W. Bierce, Ltd., to Clinton J. Hutchins, Trustee, dated September first, 1904, and ask you if you know whether Mr. Hutchins received the original of that letter?

A. I haven't any recollection of that, Mr.—

The COURT: You haven't any recollection?

A. No recollection.

Mr. PROUTY:

Q. Do you know whether or not you have it among your papers?

A. No, I am sure I haven't it among my papers.

Q. You have not searched for that, have you?

A. I have not searched for that particular letter, because I never—don't remember anything about it, but I have searched through my papers very carefully, not long ago, for all correspondence, and I didn't find that or anything like it.

Q. Has Mr. Hutchins here in Honolulu or on this island any papers relating to this litigation, so far as you know, other than such as he has left in your possession?

A. Well, I don't—I can't answer that in the way you put it; he must have a lot of papers which bear on this investigation—on this litigation; he must have. The—there are deeds and papers of that character he must have, receipts and things, lots of them, I suppose, at least I never had them; he must have them in his possession.

Q. Well, you mean that he left them here?

A. Well, don't know whether he left them here or not. When Mr. Hutchins went away at this time I was sick for two or three days, before he went away, and I didn't get a chance to see him as I intended to see him before he left, and I had not seen him for sometime previous to that and had had no opportunity at all to speak with him concerning this litigation. I intended to see him before he left, but on account of my not getting down town I didn't see him. I don't know just what he did with all the matters that pertained to this that were in his possession.

Q. Well, you have produced correspondence here which you have identified, and do you know whether that is all the correspondence in your possession between Mr. Hutchins and the firm of Kinney, McClanahan & Cooper?

Mr. WITHINGTON: We object on the ground this is already answered.

The COURT: I think he answered it.

The WITNESS: I can search again, if you want me to. I have made, of course—I never looked for that letter because I never—I don't remember anything about it.

Mr. PROUTY: Well, I will offer the copy in evidence.

Mr. WITHINGTON: We object to this as incompetent, irrelevant and immaterial.

The COURT: I suppose the foundation is not sufficiently laid, is it Mr. Prouty?

Mr. PROUTY: I didn't understand it was objected to on the ground that the foundation was not laid.

Mr. WITHINGTON: I had not completed the objection. Our main objection is that this is entirely irrelevant, and immaterial to this case, a part of the plaintiff's case in chief, not proper cross examination, and there has been no proof of any delivery of this letter.

The COURT: I think it is pertinent. It will be admissible if the proper foundation is laid as to delivery.

677 Redirect examination of JOHN W. CATHCART.

Mr. WITHINGTON:

Q. Mr. Cathcart, have you any further explanation in regard to any matters which have been asked by Mr. Prouty that you desire to make?

A. Well, only in reference to the one question in which he asked me concerning the one paragraph of that first—of that letter.

Mr. PROUTY: I don't think that is proper.

The COURT: I will permit the question.

Mr. PROUTY: I save an exception.

A. In the last letter that I answered—that I wrote in answer to Mr. McClanahan's letter to me, or Derby's letter to me, I said that I referred, in speaking about the delivery of the property, that I—

Mr. PROUTY: I object to that, if your Honor please. Let the witness refer to the exhibit; I don't know what he is talking about.

The WITNESS: To explain what Mr. Prouty asked me, if the paragraph in the letter referred specially to the first letter that I had written, making the delivery, and I said that it did, and went on to state something else which was stricken out, if the court remembers, and I just want to supplement what I said there by saying that—explaining that the—about the special reference; Mr. Prouty asked me if I specially referred in that letter to another letter.

The COURT: I understand.

678 A. And I said "specially", and then I went on to say something which was stricken out, and I want to add on there what was the truth.

Q. Within your knowledge?

A. Yes, within my own knowledge.

The COURT: Very well, it may be permitted; you may answer it.

A. In the paragraph that Mr. Prouty referred to, and which I said specially referred to the first letter of delivery of the property,

I want to say that at the time that this was written I had learned what had occurred——

Mr. PROUTY: I object to that, if your Honor please, what he had learned; that is incompetent.

(Objection overruled.)

A. I am not going to state what I have learned at all.

Mr. PROUTY:

Q. Are you going to state the confidential communications between yourself and your client? If you are I want to cross examine on that.

The COURT: Let the witness answer.

A. I had learned what had occurred down at the property in Kona when Mr. Cooper had gone down there, and it also had some reference to that, in referring to it.

Q. So then your letter isn't based entirely on——

A. Not entirely; it also had some reference to that.

Mr. WITHINGTON: That's all.

Mr. PROUTY: Just wait a minute. There will be a little more under the recross-examination.

679 Recross-examination.

Mr. PROUTY:

Q. Then, referring to this paper, Defendants' Exhibit "8," I understand you to say that by the statement in that letter, reading as follows: "As we have long since turned over this property to you under the execution, on your demand, precisely as we received it," you referred to what took place down on the Island of Hawaii——

A. O no.

Q. —when Mr. Cooper was down there?

A. You misunderstand me entirely. What I meant to say was that that paragraph was written and placed there not alone because of what had taken place at the first start-off, but because of what I had learned down there and in reference to what I had learned occurred down there.

Q. That is the reason why it was put in the letter?

A. That is one of the reasons why it was put in the letter.

Q. I didn't ask you for that reason.

A. Well, that is one of the reasons why it was put in.

Q. I asked you what that paragraph, what that clause, referred to, to what time and circumstances you referred by the statement contained in that letter, "As we have long since turned over the property to you——"?

A. That refers of course to the first turning over.

Q. It refers, does it not, to what is set forth in Defendants' Exhibit "3"?

A. Yes.

Q. And that is all it does refer to?

680 A. That is all it refers to, yes, but it was written because the facts that I had learned had occurred down there, and in reference to those it was inserted.

Mr. PROUTY: I move to strike out "It was written because of facts which I have learned had occurred down there and in reference to those" as unresponsive to the question.

The COURT: That was the occasion of writing the letter?

A. Occasion of putting in that paragraph.

(Objection overruled.)

Mr. PROUTY:

Q. It is true, is it not, Mr. Cathcart, that you were not on the Island of Hawaii at the time of and during the happening of the events you mention in your testimony; you were not there?

A. You mean when——

Q. Isn't that true?

A. —Cooper was down there?

Q. Yes.

A. No, I was not there; I was in Honolulu here.

Mr. PROUTY: I move to strike out the last answer, your Honor; that is, I renew my last motion.

The COURT: Motion to strike will be denied.

Mr. PROUTY: Take an exception.

That's all.

Mr. WITHINGTON: That's all.

(Mr. M. F. Scott called.)

681 Objections, rulings, etc., and testimony of Waterhouse and Thompson, recalled, will be found in Appendix beginning on page 208, as per numbers.

(Sig.)

J. L. HORNER.

Direct examination of M. F. SCOTT, called and sworn.

By Mr. CATHCART:

Q. Where do you live Mr. Scott?

A. In Kona Hawaii.

Q. And how long have you lived there?

A. 15 years.

Q. Are you acquainted with the plantation in Kona, Hawaii, known formerly as the Kona Sugar Co.?

A. I am.

Q. Were you acquainted with that plantation, with the lands and the property that had comprised that plantation in the year 1903?

A. I was.

Q. Were you acquainted then with the railway material for which the replevin suit was brought by William W. Bierce Ltd. against C. J. Hutchins, Trustee?

A. I was.

Q. Were you acquainted with it before the commencement of that action?

A. I was.

App. 1.

Q. How had you become acquainted with it?

A. I saw the material when it was—when it first arrived there on the wharf, being hauled from the wharf to the plantation, which was then in charge of the Kona Sugar Co., and later when the cars were set up and equipped and the greater part of the rails were laid on the track and one of the locomotives was set up I was the receiver of the Kona Sugar Co. and in charge of all—of all its affairs and matters.

Q. And you say at that time when you were appointed receiver of the Kona Sugar Co.'s properties, you say that part of the rails had been laid?

App. 2.

A. At the time the receiver was appointed about two miles of the rails were at that time laid.

Q. And one of the locomotives set up?

A. One of the locomotives set up — in working order.

Q. Follow on now and state what you knew or learned afterwards of the property.

3. (Objection; overruled.)

Q. Now go on and state what further you knew about that property at the time you speak of when you brought yourself down to where part of the rails only were laid there.

A. Well, at that time, in March 28th, 1902, or '3—1902, when the receiver was appointed, two miles of the track was laid, one locomotive was set up, the smaller one, and in working order, and the cars were there partially set up; the remainder of the rails were lying in a pile on the ground; the track scales were there, not set up. The larger locomotive was still in Honolulu; was brought from Honolulu by the receiver and set up, put in working order, fit for working. I proceeded at once to lay the remainder of the track, about four miles of the track laid with Bierce rails, the rails purchased from Mr. Bierce and one mile laid with other rails,—and a little more perhaps,—and to finish the cars ready for use and to put them into use.

4.

Q. Now then I understand you to say that during your receivership you laid part of the rails and set up part of the cars and locomotive?

A. Yes.

5.

683 Q. Then at the end of your receivership where was this property in question, that is the property for which the replevin suit was brought?

6.

A. It was at the same place where I had put it. The rails were on the track, on the right of way of the Kona Sugar Co., the cars were distributed along on the track, and the locomotives were on the track. The scales were lying in a building on the plantation, not set up.

Q. When did your receivership end, do you remember?

A. My receivership ended on November —, November 1902. I was succeeded by Mr. Dortch.

Q. Now this action this replevin action of which we have been speaking, was begun—Do you remember when the replevin suit was begun?

A. I do, yes. It was begun in the month of July, or about the month of July, in the year 1904-'3.

Q. '3?

A. '3.

Q. July 1903?

A. Yes sir.

Q. Well now, from the time of the space of your receivership up to that time what was your knowledge of this property, this railway material?

7.

A. Saw it daily and had gone along the entire length of the track frequently and knew of its situation and condition.

Q. Can you state where this property in question, this railway material and equipment, was at the time of the commencement of that replevin action?

A. The rails were all spiked down on the cross ties along the line of railway on the rights of way of the Kona Sugar Co.

Q. The same that you have already mentioned?

684 A. The same that I have mentioned. The cars were all, except one car, on that track. The cars, the locomotives were on those rails on the track; the scales were at the same place under the—under the—in a building on the plantation grounds.

Q. And that was all in Kona, on the Island of Hawaii?

A. All in Kona on the Island of Hawaii.

Q. You have spoken about one car not being on the track—

A. There was one car broken during the time of my receivership and that car was off the track but lying on the grounds of the—on the land of the Kona Sugar Co.

Q. Do you remember when the judgment was rendered in that replevin action?

A. I do.

Q. State when this judgment was rendered, to your recollection.

A. I can't remember the date or the month but it was in the early part of 1904. It was before—it was earlier than May; in the month of March or April of 1904.

Q. Between the time that you have stated to be the commencement of this action, when you stated where the property was, and the time of the rendition of the judgment, either in March or

April of 1904, state what you knew of this property; what opportunities you had to see it and if you did see it.

8.

A. Yes, I knew the property during all the period of the pendency of the suit, saw it weekly, or at least every ten days, during that time, and passed along the line of the railroad a number of times. The property was at the same place as it was at the beginning of the suit and in the same condition, *exception* for whatever deterioration from the elements. The cars were distributed at various points along the line of the railroad; the locomotives were on the track; the scales were in the same place as they had been from the time they were first landed there.

Q. During the last period that you have described or you have mentioned, from the commencement of the action up to the time of the judgment, what was your connection with this property?

9.

A. Well, I was a beneficiary under the trustee of the property and had authority from Mr. Hutchins—I had authority, full authority in oral—oral authority from Mr. Hutchins to act for him in all and every capacity concerning or regarding any of this property and other property in Kona. My acts have always been ratified by him, and continuing along after the rendition of this judgment.

10.

Q. I hand you document endorsed "In the Circuit Court, Third Circuit. M. W. McChesney & Sons vs. Kona Sugar Co. Ltd., et al. Petition"—and file mark, filed May 20th, 1902, J. B. Curts, Clerk." Ask you if you have seen that before?

A. Yes, I have seen it. Shall I tell you what it is?

Q. Can you state who prepared that document?

A. It was sent—

Q. Look over it and see if you can state who prepared it.

A. It was prepared and sent to me by the firm of—

11.

[(Objection. Argument. Marked 9 for ident.)]*

Q. I hand you another document endorsed In the Circuit Court, Third Circuit, M. W. McChesney & Sons vs. The Kona Sugar Co. Ltd., et al. Order. File Mark, filed May 21, 1902, J. B. Curts, Clerk. Ask you if you have ever seen that before?

A. I have.

Q. State when you saw it in reference to the time that you received the document marked for identification No. 9.

A. I saw it at the same time. The two came together, came into my possession together, under the same circumstances.

(Offered as 10 for ident.)

12.

p. 214, App.

[(J. A. Thompson rec.) (Mr. Scott rec.)]*

[* Words enclosed in brackets erased in copy.]

Q. Now to return for a moment to the time when the judgment was entered in that replevin action. Are you acquainted with Mr. Cooper, Mr. Henry E. Cooper?

A. I am.

Q. Were you acquainted with him in 1904?

A. I was.

Q. Do you remember seeing him in Kona in the month of May, 1904?

A. I did see him in that month there.

Q. At the time you saw him were you still acting for Mr. Hutchins down there and still a beneficiary under the trust? Well, in what capacity were you acting there?

A. I was acting as Mr. Hutchins' agent and was still a beneficiary.

13.

Q. What day was it, do you remember, that you saw Mr. Cooper down there?

A. It was on Saturday the—I have to refresh my memory as to the date from my memorandum, if I can.

Q. Memorandum made at the time?

A. Made very soon after, yes. It was on Saturday, May 21st, 1904.

Q. Did you know at that time what Mr. Cooper's occupation was?

687 A. I knew that he was a member of the firm of Kinney, McClanahan and Cooper, a law firm in Honolulu at that time.

Q. About what time of that day, Saturday, May 21st, 1904, did you see Mr. Cooper?

A. It was after 9 o'clock and it was before 10 o'clock.

Q. And where was it that you saw him?

A. He came to my place, my home, to see me.

Q. Did you have any conversation with him at that time and place in reference to this railway material?

A. I did.

Q. State what was said, what that conversation was.

14.

A. Mr. Cooper came to me and told me that he came as an agent of Mr. Bierce, as a member of the firm of Kinney, McClanahan & Cooper, who were his attorneys, for the purpose of taking the actual possession of the—of the property involved in the action and in the judgment and execution which had been issued, and he wanted information regarding the situs of the property and how he could get the actual possession. I told him I would give him that information regarding the property, where it was, and that I could and would render him every assistance necessary in putting him in actual possession of the same, and that there would be no opposition unless it would—that there would be no opposition except that the Kapiolani Estate were claiming to be in possession of a certain

part of the premises where some of this property was; that they were there only as trespassers and that if necessary I could and would remove every particle of the property from that part of the premises for him; and he replied that that would be unnecessary; that their relations with the Kapiolani Estate were perfectly amicable and there would be no trouble there. I told him then that I would go on the following Monday and meet him at the railroad and would go with him to all places where any of this property was and would put him in the possession of it.

Mr. CATHCART:

Q. You said that Mr. Cooper said he was the agent of Bierce. Whom do you mean by "Bierce"?

15.

A. Well, he told me that he was the agent, an attorney of the firm of Kinney, McClanahan & Cooper, for Mr. Bierce. I don't remember whether he said W. W. Bierce but he named the action W. W. Bierce versus Hutchins, Trustee; he described that as the purpose of his visit there.

Q. You say that Mr. Cooper—that when you said that the Kapiolani Estate were claiming possession of a portion of the premises on which some of the property was that they were trespassers and that you could and would take off the property and deliver it to him if he wanted you to?

A. I did.

Q. You say that then Mr. Cooper said that that was unnecessary, because their relations with the Kapiolani Estate were friendly, or amicable. Now do you know at that time what relations Kinney, McClanahan & Cooper bore to the Kapiolani Estate?

The COURT:

Q. Well, answer it by yes or no. Did you know the relationship existing between the firm of Kinney, McClanahan & Cooper and the Kapiolani Estate at that time.

A. I did.

Mr. CATHCART:

Q. What were those relations?

16.

A. The firm of Kinney, McClanahan & Cooper were acting as attorneys for the respondent in writ of certiorari from the Supreme Court in the case of Kapiolani Estate vs. Hutchins; I came in contact with them in that trouble, on many occasions I came in contact with the firm of Kinney, McClanahan & Cooper.

Q. Well then, as I understand Kinney, McClanahan & Cooper were Hutchins' attorneys?

A. No, attorneys—the respondent was—for the Kapiolani Estate in that action. They were—the respondent was the magistrate

named but they were acting for the Kapiolani Estate as Mr. Cathcart was acting for Hutchins in the certiorari proceedings.

Q. Before what court?

A. In the supreme court of the Territory of Hawaii.

17.

Q. That litigation which you speak of in which this writ of certiorari was issued, in which Kinney, McClanahan and Cooper were representing the Kapiolani Estate, what property did it involve, do you know? If you know what property, of your own knowledge?

A. I do know of my own knowledge. It involved a certain tract of land. I know the property and the proceedings from their incep-

18.

tion in the district court at North Kona before the second district magistrate and of the proceedings there and judgment and appeal to the circuit court, and pending the appeal of the application to the magistrate, without any notice to Mr. Hutchins or his agents, procuring a writ of possession and coming to the premises and forcibly removing myself and some others and holding the possession for a time, and I came immediately to Honolulu, and in consulting with Mr. Hutchins, I think Mr. Cathcart had him apply to the supreme court for a writ of certiorari; that the district magistrate was directed to send up his records—

690 Q. I want to know what property that litigation covered.

A. It covered a tract of land, a leasehold in Kona about 400 feet across from north to south until it reached the railway land and on which a part of the property in the Bierce versus Hutchins replevin suit then was.

19.

Q. That conversation then which you had with Mr. Cooper was early in the morning of Saturday, May 21st 1904. Now, did you have any conversation with him again that day or meet him again that day?

A. No, I didn't meet him again that day.

Q. When did you next see him?

A. I next saw him on the Monday following. On the Saturday when he called at my house I arranged to meet him on Monday morning at the railroad.

Q. That would be Monday, May 23rd?

A. May 23rd, yes.

Q. And about what time of day did you meet him there?

A. It was—it was later than 8 o'clock and it was earlier than 10 o'clock; I can't very well fix the exact time any more closely than that.

Q. That was down on the railroad?

A. On the railroad, yes.

Q. And by the railroad you mean the railroad in question here, the rails—

A. The railroad—

Q. Where the railroad was?

A. In question, and the rails, yes.

Q. Who was present there at the time?

A. Mr. Cooper, Mr. Nahale, the deputy sheriff of North Kona, Mr. Conant, E. E. Conant, and myself.

691 Q. Now did you have any conversation with Mr. Cooper there at that time?

20.

A. I had some conversation with Mr. Cooper and also with Mr. Nahale, and I served a written notice, a typewritten notice, on Mr. Nahale, and a copy of it on Mr. Cooper, and I told Mr. Cooper and

21.

Mr. Nahale that I was then—I told him that I was prepared to go with him to every place where any of this property was and put them in the actual possession of it; that I could and would, and nobody had any right, any right of any kind to object; that if there was any protest, or objections raised by any person, I would take the property and put it in their possession.

Q. What then was said, if anything, or occurred, if anything more?

A. Mr. Cooper read the notice that I had handed—served on Mr. Nahale and Mr. Cooper, and he turned to Mr. Nahale and said "Mr. Sheriff, I decline to accept the property" or "I refuse to—Mr. Sheriff I refuse to accept the property"—I am not sure which word he used.

Q. I hand you this document, headed "Notice", and ask you if you have seen that before?

A. I have.

Q. I will ask you to state whether or not it is a typewritten copy of the documents that you say were served on Mr. Nahale and Mr. Cooper?

A. It is a typewritten copy, a carbon copy.

Q. Carbon copy.

A. Made at the same time and the same corrections which were made in the copy served on them are noted on this. The copies served on them were signed by myself as agent for C. J. Hutchins, and dated. This is not signed and dated. Signed as agent
692 for Mr. Hutchins.

Q. Signed "M. F. Scott, agent"?

A. I think in that way, yes.

The signature was qualified and—in that way, as near as I recall. "M. F. Scott—"

O. I would like to have you state exactly how it was signed.

A. Well, I will state exactly: "M. F. Scott as agent for C. J. Hutchins, on behalf of C. J. Hutchins and for all parties to whom it refers."

O. That is the way it was signed?

A. Yes, in that purport, that purport, I wouldn't say it was verbatim, but that was the purport of the signature.

[(Exhibit 9 read to jury.)]*

Q. Now on this Saturday and Monday of which you have spoken what was the situation of the property, if you can tell, as compared with the time that the action was commenced?

23.

A. The situation was the—The rails were in the same place; the scales were in the same place; the cars were on the track, and the locomotives, but not in exactly the same place as they stood when the action was commenced.

Q. That is, not in the same place on the rails?

A. No.

Q. But on the rails?

A. They were on the rails.

Q. Now do you remember where the fish plates were, and spikes and things?

A. They were in the same place, same position as when the action was commenced.

Q. I show you Exhibit 2 and ask you if you remember having seen that before?

693 A. Yes, I have seen this.

Q. And Defendant's Exhibit 3, and ask you if you have seen that before?

A. Yes, I have seen that before.

Q. In this notice, Defendant's Exhibit 9, which you say was served on Nahale and Mr. Cooper on the Monday you—I call your attention to this paragraph (showing), where it says "Said delivery * * * and ask you to what demand that refers, if you know?"

A. It refers to the demand, Exhibit—first exhibit you handed me which I had seen before this time; I had seen the demand.

Q. Exhibit 2.

A. Exhibit 2.

Q. This demand dated April 18th, 1904.

A. It refers to this demand which I had seen prior to this date.

Q. Exhibit 2. And between that time and the last date you have mentioned, I will ask you whether—if you know whether or not any authority or control—or whether Mr. Hutchins exercised—used any of this property or had it in his possession, subsequent to the date of the demand and between the time, this Monday, up to that time, during the period covered from the delivery as we claim up to the time that the notice—

24.

A. From my own knowledge, which I from close connection with all these matters, from the date of the demand and the date of the surrender by Mr. Hutchins, Mr. Hutchins and myself nor any of his agents used or exercised any control over any of the property
694 described in the demand and in the written compliance with the demand by Mr. Hutchins.

[* Words and figures enclosed in brackets erased in copy.]

Q. By the written compliance do you mean this Defendant's Exhibit 3 which I have shown you?

25.

A. I do.

(Afternoon Session, May 14.)

Q. Have you stated all of the conversation that you had with Mr. Cooper down there on that Monday morning?

A. I have stated all that I said. After the statement which Mr. Cooper made, as I have testified, he said some other things that were personal to myself and not very complimentary, and turned around and walked away and I turned around and walked away too.

Q. I hand you Defendant's Exhibit 5 and ask if you will read the paragraph commencing, "Mr. Scott, who is interested in the Kona Sugar Co. has made statements——"

I will now ask you if you at any time made any statements that the rails were laid in part on lands without the permission of the owners thereof and in some cases during the night time, and any attempt on the part of the plaintiff to remove these rails would lead to trouble and litigation?

26.

A. No, I never made any statement of that character, and the facts——

Q. What have you to say as to the facts, as to whether or not these rails were laid in the night time or whether any attempt to remove them would lead to trouble and litigation; laid on lands without the permission of the owner?

A. No rails were ever laid during the night time and no rails were ever laid anywhere without the permission of the
695 owner, and no person ever——

27.

Q. Go on. You were stating that no rails were ever laid without the permission of the owner. Now as to any trouble or litigation which would follow their removal by the Bierce people or their attorneys, did you ever make any such statement; what is the fact as to that?

A. I never made such a statement.

Q. What is the fact as to anybody threatening any trouble or litigation if they were removed?

28.

[(Objection Sus.)]*

Q. Can you give us the value of the rails that were laid on the property that the Kapiolani Estate were claiming there at that time?

A. There was between 10 and 12 tons of rails lying on the lands——

[* Words enclosed in brackets erased in copy.]

Q. Go on and state what the value is. You say there was so many tons.

(Question withdrawn.)

Q. Did you have any conversation with the sheriff down there at the time in question, between the 21st day of May 1904, and the 23rd day of May 1904, or with his officers, in reference to this property? If so, state what it is.

[(Objection. Thompson rec. Scott rec.)]*

29.

Cross-examination.

Mr. ROBERTSON :

Q. When was it, Mr. Scott, you say you first saw this railway material?

A. It was when it was first arrived at the landing and was 696 being hauled to the plantation; it was sometime late in 1900 or in 1901.

Q. Late in 1900?

A. Either the latter part of 1900 or 1901.

Q. What vessel brought this material there?

A. The gasoline schooner the Eclipse.

Q. From Honolulu?

A. From Honolulu, yes sir.

Q. And she landed this stuff at Kailua?

A. Kailua.

Q. Did you see it being taken ashore?

A. I saw some of it, not all of it.

Q. How was it taken from the vessel to the shore?

A. In a boat, in the schooner's boat.

Q. And also lighters were used, were there?

A. I never saw any lighters being used.

Q. Take the heavy pieces ashore in the small boats?

A. I never saw anything else being used, although I was not there at all times.

Q. When you say the landing you refer to Kailua, do you?

A. Kailua, Kailua landing, Kailua wharf.

Q. How far was it from the wharf where this stuff was brought ashore to the plantation; that is, that part of the plantation to which the stuff was hauled?

A. Little less than two miles, pretty nearly two miles, though.

Q. Was there a mill on the plantation at that time?

A. There was, yes.

Q. That mill was about two miles from the plantation?

A. About two miles from the plantation.

697 Q. And this stuff was hauled up to the neighborhood of the mill, was it?

A. Some of it was delivered at the mill, some of it was delivered at the line of the railroad where the wagon road crosses it.

Q. At what? I didn't hear that.

A. At the line of the railroad where the wagon road crosses the line of the railroad, about 2000 feet from the mill.

Q. Nearer to the landing, you mean, or further away from the landing?

A. About the same distance.

Q. How was it hauled up from the landing to the premises?

A. It was hauled on wagons, lengthened out, without any—any box or wagon box; carted on—the wagon box was taken off, the coupling lengthened, the rails put on and hauled up with six mule teams that the plantation at that time had, three of them three teams of six mules each; probably one team had a span of horses or two in, I am not sure.

Q. On the arrival of the stuff on the plantation premises was it immediately put to use; that is to say, did they immediately begin the work of laying the track?

A. Yes, for a short distance, two miles, two miles and 1200 feet. The—two miles was not completed in 1902 at the time of the receivership, a few hundred feet of it still unlaidd. The first section was graded.

Q. You mean to say 200 feet short of two miles, is that it?

A. The first section was 1200 feet; that was the contract for grading; the next section was a two mile contract, which was graded, and the rails on all of those two sections with the exception
698 perhaps of between two and three hundred feet was laid in 1901, and—

Q. When was the final track laid?

A. A track for the—this material was finished in June, 1902, probably early in June; then there was a delay until they got other rails to finish the remaining part, the mile or more, which was not finished until the end of June or first of July, when the entire length was completed ready for use.

Q. And you mean that the laying of this plantation railroad was completed by the receiver, is that it?

A. I do, yes.

Q. And had not been completed prior to the appointment of the receiver?

A. It had not.

Q. And on this track there were two locomotives, were there?

A. Yes; there was one set up and in use when the receiver was appointed; the other was shipped to Kailua after the receiver was appointed and was set up and ready for use about July first, 1902.

Q. When you say that it was shipped after the receiver was appointed you mean sent from Honolulu up to Kailua?

A. From Honolulu, yes.

Q. Did that property remain in use up to the time of the receiver's sale?

A. It did.

Q. And was it continued in use after the receiver's sale?

A. It was, up until the execution—the issuing of this writ of execution on the judgment rendered on the replevin suit.

Q. Do you remember the date of the receiver's sale, Mr. Scott?

699 A. 9th of May, 1903, I think.

Q. May, 1903. Well, subsequent to that date, up to the time of the issuance of the writ of execution in the replevin case what use was made of the property?

A. It was being used for transporting cane to the mill.

Q. Who was conducting that plantation after the receiver's sale?

A. Mr. E. E. Conant was in charge of the operations on the plantation.

30.

Q. I know, but who was the proprietor?

A. The property was operated as the Henry Waterhouse Trust Co. under a deed of trust for advances of money to carry on the operations from Mr. Hutchins, and they were the parties who were carrying on those operations in the latter part of 1903 and January and part of February of 1904 when they terminated their operations.

Q. In January or February, 1904?

A. Yes sir.

Q. What happened then with reference to the use of this property?

A. The property lay there, stood there as it had been left, until the—the decision and judgment and writ of execution in the replevin suit, and it lay there from the time of the writ of execution; that is Mr. Hutchins or no one acting for him or under him ever exercised any control nor use of any kind over it from that date until the present, for all I know.

Q. Yes.

A. Now I will state here further, which perhaps belongs to that question; after the——

Q. Unbosom yourself, Mr. Scott.

700 A. After the delivery of this property by Hutchins to the attorneys for Bierce on the execution for the—the replevin suit, Mr. Linder wanted to use the railroad and applied to me. I told him I hadn't anything to do with it; I referred him to Mr. McClanahan. He also applied to Mr. Hutchins and Mr. Hutchins told him likewise.

Q. Did you hear that conversation, this application to Mr. Hutchins?

A. I didn't hear that, no.

Q. Well, you have been around this court enough, Mr. Scott to know that—Well, this delivery that you refer to is the delivery of the 18th of April, that letter that was shown you here?

A. That is the letter, yes, there it is.

Q. Now then, as I understand you, after the receiver's sale of May 9th, 1903, and up to about February 1904, this plantation was operated by the Henry Waterhouse Trust Co. under a deed from Hutchins, is that right?

A. A trust deed, yes, to secure—as security for money advanced.

Q. Now then in or about February 1904 the Henry Waterhouse Co. dropped it, is that it?

A. They did, yes.

Q. Now then, after they had ceased operating the place in about February 1904 did anyone else take up the operation of that plantation?

A. Mr. Linder harvested some cane.

Q. Who was Mr. Linder?

A. He had been a luna on the plantation, during its continuance and operation; there was a small area of cane not harvested for which he made some arrangements to harvest.

701 Q. To what?

A. To harvest.

Q. So that he harvested the unharvested crop in his own interests, is that it?

A. In his own interest and without any permission whatever from Mr. Hutchins or his agents to use the railroad, which fact I know of my own knowledge, not of hearsay.

Q. Now was there any space of time during which there were no operations there, from the time the Henry Waterhouse Trust Co. dropped it until Mr. Linder took it up?

A. Yes, there was a period of nearly two months; more than one month, more than one month and a half.

Q. Well then, when would you say Linder began?

A. Linder began about the middle of June.

Q. Middle of June, 1904?

A. Yes. He finished about the 27th of July 1904.

Q. Now didn't Linder make any use of the railway material at all?

A. He did.

Q. For how long?

A. During that period, from about the middle of June until the 27th of July 1904.

Q. Now then between February 1904 and the middle of June 1904 were there any active operations going on in the Kona plantation of any kind? Place was entirely shut down, was it?

A. It was.

Q. Mill, railway and everything else?

A. Everything else.

Q. And remained shut down until Linder took hold in June 1904?

702 A. Yes.

Q. And it took him about a month to harvest that?

A. Little more than a month.

Q. Remainder of the crop?

A. Nearly a month and a half, I think.

Q. Month and a half?

A. Yes.

Q. And in harvesting it of course he ground it there at the mill, did he?

A. Yes, he did.

Q. And used the railroad in bringing it in?

A. Yes.

Q. After he quit, in the middle of July 1904, did anyone else take it up—27th of July?

A. No. I think from that date until late in 1906 there was never a car, rail or locomotive moved on the property.

Q. From the 27th of July 1904 until when?

A. Until nearly the end of 1906.

Q. A period of over two years?

A. Yes.

Q. This railroad material, cars and locomotives were still there on the plantation, Kona plantation, were they not?

A. They were.

Q. Now you say nothing was done with this material from July 1904 until the end of 1906. Where did the property remain during that time?

A. It remained right where it had been; the cars were in the same vicinity and everything remained undisturbed, just stood there.

Q. That is, the railroad track remained where it had been laid?

A. Yes.

703 Q. And the cars and locomotives remained on the track?

A. Yes.

Q. And what happened about the end of 1906? What happened to this property in the latter part of 1906?

31.

A. Well, I have no information. I sold out my interest in 1905 and know nothing more regarding it except what I heard and what I saw. I did see the property in use in the latter part of 1906 and during 1907; by what right or authority or by whom I know nothing about.

Q. Well, if you saw it being used you must have seen who was using it, didn't you?

A. Yes.

Q. Who was using it?

32.

A. I don't know who was using it.

Q. Well, who did you see using it?

A. Well, I saw a Portugee, two or three Portuguese.

Q. Two or three Portuguese, yes; anybody else?

A. And a native.

Q. What are the names of those Portuguese?

A. Joe Enos was the name of one of them.

Q. Yes, and the others?

A. And the other Portuguese I can't name him. I know him. The native went by the name of Manuel; and I occasionally saw two or three Japs.

Q. See anybody else using it?

A. No.

Q. You live[d]* in that vicinity [there,—Mr.]* do you, Mr. Scott?

A. I do.

Q. How far from the plantation mill do you—is your residence?

A. Two miles approximately.

704 Q. Two miles?

A. Yes.

Q. Towards Kailua or away from Kailua?

A. Coming the other direction from Kailua.

Q. You pass the mill, plantation premises, coming from Kailua to your place?

A. Not the mill; across the railroad a short distance from the mill.

Q. Past the fields, pass along the lands of the—that is the lands under the control of the Kona Sugar Co. Ltd.?

A. Some of them, yes, some of them.

Q. Yes. Have you seen Mr. McStocker up there since 1906?

A. I have seen him there, yes, many times, a number of times.

Q. What's that?

A. A number of times I have seen him.

Q. Where did you see him?

A. I saw him, sometimes at my house.

Q. Yes.

A. And I saw him—once I was at the mill with him.

Q. At the mill?

A. Yes.

Q. Did he have any authority on those premises that you know of?

[(Ob. sus.)]*

33.

Q. What was McStocker doing there?

34..

A. Well, he was there on business in connection with the Kona Development Co.

Q. Yes, and the Kona Development Co. is in charge of this railroad material, isn't it?

A. I don't know.

Q. You don't know that?

A. I do not.

705 Q. Is that the truth, Mr. Scott?

A. That is the truth.

Q. Don't you know that the Kona Development Co. now has the property that the Kona Sugar Co. used to have?

A. I——

35.

(Last few quest's and ans. read.)

A. My answer was that I do know. Well, it is whether—that they own a part of the property formerly property of the Kona Sugar Co., but if you want my opinion, I don't think they own any of the

railroad property; I don't think the Kona Development Co. owns anything in connection with that railroad; that is my opinion.

Q. Your opinion is they do not own it, is that what you said?

A. That is my opinion, yes, personally.

Q. But whether they own it or not, they are using it, are they not?

36.

A. I don't know whether they are employing the parties who operate that or not; I don't know it. I saw men working on the railroad and who their employer is I don't know. My opinion is that it is not——

Q. Since 1906 has any use been made of that mill?

—, —.

37.

Q. Since 1906 this railroad has been used in connection with the mill has it not?

A. It has.

Q. And who has been using the mill?

38.

A. Well, I don't know—State the question again, please.

(Ques. read.)

A. Well, of my own knowledge I don't know. I believe—my impression——

39.

Q. Who appeared there in the exercise of authority?

706 A. The party exercising authority, in authority at the mill, was Mr. McQuaid; he represented himself in numerous capacities; I don't know anything about his authority to appear in any of them.

Q. Well, did you ever see Mr. F. B. McStocker showing authority about there?

40.

A. I went with Mr. McStocker one time to the mill, which was in July 1905. It was Mr. McStocker's first visit there and he made a careful inspection of the mill, the property. At that time he didn't claim or represent to exercise any control or ownership; he was investigating, as he gave me the impression, with a view to considering it. Now I don't remember of ever being with Mr. McStocker at the mill or on this railroad since that time. I saw him there a number of times; he was at my house, his business was with me in regard to other matters, and I don't think that I ever saw him on the railroad or at the mill since that date in 1905, and within a week after that time my interests were all sold and assigned; I had no more interest in either the railroad or the mill or any of what had been the Kona Sugar Co. property after that.

Q. You sold out to the Kona Development Co.?

A. No, I did not; I sold out to Mr. Hutchins.

Q. Hutchins?

A. Yes.

Q. And when was that?

41.

A. It was the end, about the end of July 1905.

Q. You still insist, do you, that you don't know that the Kona Development Co. now has this property?

(Ob. sus.)

707 A. I wish it to appear that I am not evading the answer.
I am not—I am not trying to evade it.

Q. You never had any written authority to represent Mr. Hutchins, did you?

A. No, my authority was by an oral agreement.

Q. Yes. You stated in your direct examination that your acts had been ratified by Mr. Hutchins; were they ever ratified in writing?

A. I think that some of them were. I saw him, though, very frequently and told him of the acts that were done, what I had done.

Q. The ratifications were oral?

A. I think that—I think that there was one or two acts which he approved of that was in writing, though I cannot remember for sure, but I think there was, but usually——

Q. You haven't them with you now?

A. Usually they were—it was oral, because I was here two or three times every month during the whole time and saw him.

Q. Yes; the bulk of your arrangements with Mr. Hutchins were by way of conversations?

A. Yes.

Q. You haven't any of those written ratifications with you now, have you?

A. I have none with me, no.

Q. Were there any times when Mr. Hutchins repudiated your actions?

A. No, there was no time; he never repudiated any act that I did regarding any of the property.

Q. That is to say, he never communicated any disapproval to you, either in writing or orally?

708 A. Well, I think that he communicated an approval of everything, either in writing——

Q. I know; I am not talking about ratification now. I am talking about disapproval. Did he ever, orally or in writing, to you, disapprove any of your acts?

A. He never did.

Q. This railroad track that we have been talking about ran across the lands of numerous persons did it not?

A. It did.

Q. About how many, for a rough guess?

A. May be 15 or 20, I estimate; I think not to exceed 20; 20, put it a little higher, 24; that is, there were 24 or more rights of way acquired.

Q. On the 21st of May 1904 where did you first see Mr. Henry E. Cooper?

A. He came to my place at the postoffice; I was at that time postmaster. I had just finished the distribution of the mail, and he came in.

Q. The postoffice at Kailua?

A. No, at Holoaloa where I live.

Q. Weren't you down at Kailua when the steamer got in that day?

A. Well, my recollection is not distinct, but my impression is that I went on the steamer, this same steamer that carried Mr. Cooper to Kailua, and I went as usual immediately home, and was there before the mail came up, and he came, well, a considerable time, two hours, surely, after—

Q. I was going to ask about that. Do you remember being a passenger on the same boat from Honolulu to Kailua with Mr. Cooper at that time?

A. I remember distinctly returning on that return trip with him; I can't recall the fact of his presence on the trip, but—but
709 my impression is that I was aboard that time.

Q. It was the Mauna Loa, was it not, the steamer?

A. It was the Mauna Loa, yes.

Q. Do you remember driving up from the landing with Mr. Cooper?

A. I didn't drive up with him; I am sure of that, and I don't remember how I went up but I do remember that he came later, in a hack by himself, that is being driven in a hack.

Q. You don't remember how you went up yourself?

A. I don't recall that morning. I sometimes hired a hack and sometimes rode a horse of my own and sometimes walked. I made a great many trips that way and I can't remember that particular morning; I don't remember.

Q. You are positive, are you, that you didn't drive up to the Kona Plantation premises from Kailua with Mr. Cooper, that day?

A. I am sure of that.

Q. Do you remember what time the steamer got to Kailua? Morning, was it?

A. Yes, it was in the morning, and I don't remember, it sometimes gets there before daylight and sometimes a little after daylight; this particular trip I don't remember whether it arrived before daylight or afterwards; that I don't remember.

Q. At any rate, it was in the early morning?

A. Yes, it was in the early morning.

Q. So, whether you were a passenger on the Mauna Loa or not, you remember Mr. Cooper driving up to your place in a hack that morning?

A. I remember him arriving there in a hack.

710 Q. Yes

A. Yes, I remember that distinctly.

Q. Do you remember who the driver was?

A. I do not.

Q. And the conversation that you have already referred to took place between you and Mr. Cooper then and there?

A. It did.

Q. How long was he at your place that morning?

A. Well, it didn't exceed half an hour; it was less than half an hour.

Q. Yes. Do you know where he went to from your place?

A. I think he was driven to McWayne's but I don't know for sure.

Q. McWayne's?

A. McWayne's.

Q. How far is that from your place?

A. Two miles, along the same road.

Q. When did you next see Mr. Cooper?

A. On the Monday following between 9 and 10 o'clock.

Q. When you saw him had you seen Nahale?

A. I had not see- Nahale, I had seen one of his officers.

Q. Did you see Nahale on Saturday the 21st?

A. I don't—I don't remember of seeing him in the morning; I don't recollect seeing him that day.

Q. By the way, Nahale has since died?

A. Yes.

Q. Do you remember when he died?

A. It was in the latter part of last year the month I don't remember; it must have been after the middle of last year.

Q. Did you see Mr. Cooper again on that Saturday or not?

A. No, I didn't see him again that day.

711 Q. Where did you see him Monday morning?

A. At the railroad, between the wagon road and the mill.

Q. How far is the wagon road from the mill?

A. Less than 2000 feet.

Q. Well, was that the place designated for you to meet him?

A. I don't think we named a special place; we met accidentally; we met—he and Mr. Nahale were coming one way and Mr. Conant and I another and we met there that morning.

Q. Mr. Conant?

A. Mr. Conant and myself, yes.

Q. So you just happened to meet at that particular point accidentally, as far as the point of meeting was concerned?

A. We met there, yes.

Q. By the way, what if any connection did Mr. Conant have with this property at that time?

A. Well, he had, during the time the cane was being harvested he was employed by the Henry Waterhouse Trust Co., but their trust deed had terminated by its own terms and they had relinquished it. Mr. Conant had—I don't think had any—

42.

[Answer in regard to termination of deed stricken.]*

Q. That is to say, Mr. Conant was in the position of manager of the plantation as long as it was a plantation, was he?

A. Yes, while they were harvesting the cane.

Q. And during the period covered by the Henry Waterhouse Trust Co.'s interest in the matter?

A. While they were harvesting cane. I—to my knowledge he had not any business after they terminated harvesting cane, the part that he harvested.

Q. Well, when did Mr. Conant get through harvesting cane?

712 A. Latter part of February preceding, or early in March; I think he finished up in February—my recollection.

Q. Well, did he have any connection with this property subsequent to that that you know of?

A. No, I don't think that he exercised any connection with it whatever after that—

Q. What was Mr. Conant doing there, Mr. Scott?

A. He was living there, waiting for something else to turn up, which didn't turn up until in June.

Q. That is when Linder went on with the harvesting?

A. No.

Q. What?

A. It was when he was appointed receiver of the Parker ranch. He was appointed receiver at 2 o'clock and started for Waimea the same afternoon.

Q. That was in June of 1904, was it?

A. Yes, I think that—yes, that was June 1904, yes, early in June.

Q. He had to go over to Waimea?

A. He went over that same—the same evening.

Q. In May 1904 were was Mr. Conant living?

A. He was living in a house on the Ewa (?) road which he leased from the Greenwell Estate, Mrs. Greenwell.

Q. How far from your place, your residence?

A. Less than half a mile.

Q. Had you asked Mr. Conant to go along with you that Monday morning?

A. I did.

Q. What did you say to him in regard to going with you?

A. I can't remember anything that I said, merely only
713 that I asked him to go with me to—that's all that I can remember, that I asked him to accompany me.

Q. What was your reason for asking him to go along with you?

A. As I recall now I wanted him to be a witness of what transpired.

Q. Well, did you tell Mr. Conant anything that you intended to do or likely to happen or anything of that kind that you remember of?

A. No, I can't recall that I did; my memory seems to recall that I told him I wanted him to witness what transpired.

Q. So you wanted him to go and witness you serve that notice on Nahale and Mr. Cooper?

A. I don't remember whether I designated the notice or whether I told him that I had the notice; I don't remember that I did.

Q. When did you ask Mr. Conant to come along with you?

A. I think it was that morning.

Q. You went over to his house and got him, is that it?

A. I don't recollect how I met him or where, but I know that I requested him to come; I recollect that.

Q. You had this type written notice with you at that time, had you?

A. I don't remember that. I think I had, because I—I don't remember whether I typewrote them on a Saturday or Sunday; may be on Sunday.

Q. Well, the question is whether or not you had them with you at that time?

A. I don't remember but probably I had them in my pocket at the time.

Q. You mean to say that you did the typewriting yourself?

A. I did.

Q. At your own house?

A. Yes.

714 Q. So that at any rate by Monday morning you had this notice already typed and all ready for delivery?

A. I had.

Q. And your object in getting Mr. Conant to go along with you was to be a witness to the delivery of those notices, is that it?

(Ob. sus.)

Q. Well, when you say that you wanted Conant to go and be a witness to whatever took place, thereby including the delivery by you of the notice to Nahale and Cooper, isn't that it?

A. Well, it certainly did include that, because that was one of the things I had in mind that would—

Q. Well, that was the great thing you had in mind when you asked him, Conant, to go along with you?

A. No, it was not the great thing at all; that was a very simple thing.

Q. Well, what was there other than the delivery of those notices to Nahale and Cooper that you wanted Conant to witness?

A. No, that wasn't what I wanted him there for; that was a very minor part.

Q. Perhaps you didn't understand the question. The question was what else was there that you wanted Conant to go and be a witness to, other than the delivery by you to Cooper and Nahale of those notices?

A. Well, I was firmly convinced from Mr. Cooper's conversation and attitude on Saturday and from the conversation of Mr. Nahale's officer—

Q. Never mind what you were convinced of. What I am asking

715 you, what was it other than the delivery of those notices that you wanted Conant to witness?

43.

Suppose we put it this way: What did you ask Mr. Conant to go and witness that morning?

A. Well, I wished him to witness what I expected would transpire.

Q. Well, have you any present recollection of telling Mr. Conant—

(Answer stricken out.)

Q. Have you any present recollection of having told Mr. Conant that day of anything that you wanted him to go and witness, any particular thing?

A. Well, my recollection is not vivid, but it is quite distinct that I told him I wished him to go there and witness what would transpire at that time and told him what I was going there for.

Q. That is your best recollection at the present time?

A. Well, yes, that was my recollection.

Q. You mentioned nothing in particular?

A. I specified nothing to Mr. Conant, I am quite sure, though I don't recollect certainly.

Q. When you and Conant met Cooper and Nahale was there anything said as to other persons being in the way of Nahale and Cooper getting possession of this railroad material?

A. Not between Mr. Cooper or Mr. Nahale and himself—or myself, and I don't think Mr. Conant said anything.

Q. Where is the land of the Kapiolani Estate situated with reference to the place where you four met that Monday morning?

A. We met between—on the land between their two tracts; they have two tracts of land, one known as Waiaha I and the other as Kahului II, and we met on the land between. There
716 are two tracts of land between those two and we met on those lands.

Q. Whose land intervened between those two pieces of the Kapiolani Estate land?

A. One belonged to—belonged *them* to Alexander Coburn, or his wife, I believe, by leasehold, Mrs. Alexander Coburn, and the other belongs to H. Wilderoth, and I think it was on the Wilderoth land that we met; we had crossed, Mr. Conant and I had crossed one of the Kapiolani Estate lands and we met there.

Q. Now across these two pieces of land of Mrs. Coburn's and Wilderoth ran a portion of this railroad track, is that it?

A. Yes.

Q. Now whereabouts were the cars and locomotive?

A. They were on—in the vicinity of the mill, some of them on the Kapiolani Estate land, the other tract, Waiaha I, some of them on the next land north.

Q. Well, take first the large locomotive; where was that?

A. That was on the Kapiolani Estate land.

Q. And the small locomotive?

A. That was on the next land, to my recollection.

Q. Whose premises were those?

A. The fee of the land belongs to the Catholic Mission. It had been under a lease to—I don't remember who the original lessor was, but there had been many transfers and subleases; the part which the Kona Sugar Co. held they acquired from a Japanese sub-tenant, the right of way, which has not expired yet.

Q. Well, what else was there on the Kapiolani Estate land
717 besides the large locomotive at that time, the 23rd of May?

A. There were three or four cars at least. The scales were in the house on that land.

Q. And the railroad track crossed the width of it?

A. And the railroad track crossed.

Q. Anything else of this Bierce property on the Kapiolani Estate lands at that time that you recollect of?

A. Did I name the scales?

Q. Yes sir.

A. I think there was a keg or two of railroad spikes that—I am not sure whether it was on the Kapiolani land or on the next land; it was very near the line.

Q. Wasn't the Kapiolani Estate land fenced?

A. Well, not at that point it was not; it was open clear across it. Between the Kapiolani Estate land Waiaha, on which stood the mill, and the next land was a roadway or trail and the fence—there had been a fence on the Kapiolani Estate and the next land with a road way between the—but that fence had been all torn away at that time; there was no fence there.

Q. As I understand it, Mr. Scott, generally speaking the lands in that neighborhood in Kona are long strips, running mauka and makai?

A. They do, yes.

Q. And the railway line crossed?

A. Crosses.

Q. These various strips?

A. Yes, that is a fact.

Q. Now then wasn't the Kapiolani Estate strip at that time fenced on each side of it?

A. Why, it was mauka of the mill and—and makai of the
718 mill; that is there was a road leading from the mill right down the boundary between the two lands and there was a fence on either side of the road.

Q. For instance (showing piece of paper, blotter) Suppose there is the strip of the Kapiolani Estate land and there is mauka; the track ran across the width of it like that, didn't it?

A. Yes.

Q. Now then wasn't that Kapiolani Estate land fenced on either side?

A. No, it was not.

Q. Of the length of it?

A. Not where the railroad—where the mill premises are it was enclosed on the—I will call this the north; it was fenced from a point

a little below the railroad down, and a road there and a fence on the other side, and it was fenced from the——

Q. From the south side?

A. From near the track running south and from the point somewhere up here mauka, but a considerable area on both sides of the railroad track was—the fences had been torn away.

Q. Are you sure, Mr. Scott, that that was the situation on the 23rd of May 1904?

A. I am very sure, with the exception that they had put a—a rail across the cattle guard at the south boundary. At the north boundary there was nothing; it was open.

Q. Now then this strip that you have described the situation of just now, is that the strip which the large locomotive, scales and other property you have enumerated were situated?

719 A. It is, yes.

Q. Was there any property on the other strip of the Kapiolane Estate?

A. Nothing but rails.

Q. And as to that strip the rails ran across the width of it the same as the other?

A. Yes.

Q. At that time did the track extend across the full width of both those Kapiolani Estate pieces of land without any break? In other words, had any portion of the railroad track on or adjoining either piece of the Kapiolani Estate been taken up, removed?

A. They had loosened the rails and taken up the—and they were lying there just loose; they were lying there loose.

Q. Do you know when those rails were taken up?

A. It was the day when Chillingworth was there and hustled me out, sometime, 28th of March as I remember.

Q. 28th of March, 1904?

A. Preceding; that same year.

Q. By Chillingworth you mean the deputy sheriff Chillingworth?

A. I do.

Q. Well, who took those rails up, you or Chillingworth or who?

A. I don't know; I don't know. I cross there many times and saw that they were loose and that is all I know about it. I didn't see who took them up or anything about it.

Q. At what point had those rails been taken up, loosened and taken up?

A. Well, I recall three points and I—I think at the fourth point.

720 Q. Little louder, please.

A. I recall three points at the south boundary of Waiaha—Kahului II and the north boundary of Kahului II, and the south boundary of Waiaha I. I am sure they were loosened and lying there, and to the best of recollection they were at this—at the north boundary of Waiaha I.

Q. For what distance had the rails been loosened and taken up?

A. Only one rail.

Q. One rail?

A. Yes.

Q. Just one length?

A. In each track.

Q. One length in each track at the north and south boundary lines of both the Kapiolani Estate pieces?

A. Yes.

Q. And the loose rails then lay on the ground on the Kapiolani Estate lands?

A. They—they—they had not been carried right away; I think they were just shoved aside; that is my recollection, they had not been carried onto the Kapiolani Estate land wholly nor onto the other land wholly; they were just loosed and pushed on the track so cars wouldn't go over them.

Q. Now when you four met together on the morning of that Monday did you go over to or near the boundary of the Kapiolani Estate land?

A. We were near there, yes. I didn't go on, for Mr. Cooper told me it was not necessary.

Q. Mr. Cooper told you it was not necessary to go on the land?

A. He told me on Saturday, yes. I told him that that I could and would, if necessary, and he told me it was not necessary, and he did not on Monday morning tell me it was necessary.

Q. Was there any guard or watchman there?

A. I saw none.

Q. Didn't see any?

A. I saw Robert Colburn there.

Q. Robert Colburn?

A. Yes.

Q. What was he doing there?

A. I don't know.

Q. He was armed, wasn't he?

A. I didn't see any arms.

Q. Are you sure about that?

A. I am sure I didn't see any.

Q. Didn't you attempt to go on there and he made you skiddoo?

A. No, I didn't attempt. I went on there many times when it was necessary, and at all times while I was interested there, before this time and after it. I went into the mill when it was necessary to go there to get other things, other property that belonged to Hutchins, Trustee, and also I went up to the store building on Kahului II and I unlocked the door and had the combination of the safe and the key to the inner door.

Q. When was that?

A. That was in—it was after this time.

[(Precious answer strick.)]*

44.

Q. Mr. Scott, don't you remember that on the morning of the 23rd that you did go onto the Kapiolani Estate land and that when Robert Colburn advanced toward you that you got off?

[* Words enclosed in brackets erased in copy.]

722 A. I remember that I didn't go and I remember that if it had been necessary I would have gone, and if it had been necessary to take those rails off I would have taken them off, every one of them, and had men enough there to do it.

Q. Even though Robert Colburn had a gun with him?

A. Yes, even if he had a gun with him.

Mr. CATHCART: Or two of them.

A. Or two of them.

Mr. ROBERTSON:

Q. So you are sure that you didn't go on the Kapiolani land that day?

A. I am sure I didn't go on that morning and I am sure I didn't attempt to go on I—that is on one land; I did on the other land twice, the Kahului.

Q. Waiaha?

A. No, Kahului; I walked across that twice.

Q. On the 23rd of May?

A. On the 23rd of May. I cross it from side to side going and from side to side coming.

Q. Is that the piece where the locomotive was?

A. No, on the other piece.

Q. Yes, but not the piece where the locomotive was?

A. No.

Q. Did you see John Paris that Monday morning?

A. I did not.

Q. J. D. Paris?

A. I did not.

Q. Do you know whether or not Deputy Sheriff Nahale received from John Paris that morning a letter referring to this railroad material?

A. He doubtless did.

723 Q. You saw it there, did you?

A. I did not.

Q. Didn't Nahale show it to you there that morning?

A. He did not.

Q. Why do you say he doubtless did, then?

[(Ob. -us.)]*

45.

Q. Do you know whether or not John Paris or J. D. Paris or any persons for whom he was acting on the 23rd of May 1904 claimed any right in any of this Bierce railroad material?

A. I don't know what he claimed but I know that none of the Bierce material was on any lands of J. D. Paris or any others for whom he was acting.

Q. You say you don't know what he claimed?

A. I don't know what he claimed, but I do know that none of the rails were on his lands.

Q. Well, I will ask you again, why did you say that Nahale doubtless received a letter from Paris that morning?

46.

[(Ob. sus.)]

Q. Do you mean to say, Mr. Scott, that you don't know that J. D. Paris, either in his own right or in the right of any of the persons for whom he was acting or representing claimed a right of possession of any of this railroad material?

A. Read that question again. (Read). As I answered, I don't know what he claimed, but I know that none of the property was on his lands. Now if you wish me to explain how and why I think so I can; I will start if you ask me to.

Q. If you really don't know I will ask you then, didn't John Paris ever tell you that he claimed the right to possession of part of this railroad material?

A. Not of the Bierce rails; he did of the other rails; there was more than a mile of other rails at the end of the railroad which were on lands which he claimed, but none of the Bierce property was there.

Q. Did he expressly say he didn't claim the Bierce property?

A. Well, he has told me since that the—none of the Bierce rails were on his lands.

Q. Told you since?

A. He has told me since; I don't know, after the—

Q. How long after May 1904.

Mr. CATHCART: Let's get the answer.

The COURT: Have you finished your answer? Finish your answer.

A. I think that Mr. Paris at one time thought that some of the Bierce rails were on his lands and talked with me about it, I think after this time, I am sure it was after this time, and I explained to him where his land begun, and he admitted that none of the Bierce rails were on his lands.

Mr. ROBERTSON:

Q. But in May 1904 he thought that some of the Bierce property, or some of the Bierce rails, were on his lands, is that what you mean?

47.

A. He may have thought so; I don't know. He may have thought so.

(Answer to next preceding question read.)

Q. Now then it is in connection with your answer where you say that Paris thought that some of the Bierce rails were on his land and spoke to you about it, and you say that was afterwards. Now what I want to get at, after what?

A. After this 21st of May, had a conversation.

Q. So subsequent to the 23rd of May Paris thought that some of the Bierce rails were on his land, is that it?

A. Well, he seemed from the conversation, to have the

impression that the rails on his land were, or some of them, the Bierce rails, but from that conversation he found out that they were not.

Q. You corrected his mistake, did you?

A. I told him the quantity of rails and where they came from.

Q. Do you remember how long after the 23rd of May that was?

A. I don't remember.

Q. Well, a week or a month or a year?

A. It was not long after.

Q. Some weeks would you say?

A. It might have been two or three or four months.

Q. Didn't Nahale show you any letter that morning that he had got from Paris?

A. He did not.

Q. Didn't tell you that he had received a letter from Paris?

A. He did not.

Q. Did Mr. Cooper show you a letter that John Paris had written to Nahale that day?

A. He did not.

Q. Did Mr. Cooper tell you that Nahale had received a letter from John Paris, protesting against the satisfaction of that execution in favor of the Bierce Co.?

A. He did not.

Q. How many copies of this typewritten notice did you make?

A. Three.

Q. You served one each on Nahale and Cooper and kept the other one?

A. Yes sir.

Q. The one you put in here is the one you retained yourself, is it?

A. It is. There were two copies and one original; two copies and one original; there were three in all.

Q. Yes. Have you now stated, Mr. Scott, all the conversation that you had with H. E. Cooper on Saturday, the 21st of May 1904?

A. I have in substance, not verbatim.

Q. You have given us all the substance of it?

A. I have, yes.

Q. Now then, in regard to Monday, May the 23rd, have you stated all the conversation you had with H. E. Cooper on that day?

A. I have in substance.

Q. And the same is true as to Nahale?

A. I don't think Nahale spoke to me or said anything or we exchanged any talk back and forth, between Mr. Nahale; it was all between Mr. Cooper, except that when I handed the copy of the notice to Mr. Nahale, I don't think he remarked anything; he took it and read it.

Q. You don't remember of speaking, saying anything to Nahale on that morning?

A. There was nothing said by him. As I testified I remarked to him that I would go with him wherever any of the property was and put him in possession of it.

Q. Well, where were you when you made that remark to Mr. Nahale?

A. We were on the railroad; on Waiaha II.

Q. On Waiaha II?

A. Next land to Waiaha I.

Q. That is near the Kapiolani Estate land?

A. That is near the Kapiolani Estate land.

Q. And who was present at that time?

727 A. Mr. Nahale, Mr. Cooper, Mr. Conant and myself.

Q. Nobody else?

— Nobody else.

Q. Did Mr. Conant take any part in the talk?

A. No, not while we were talking, I don't recollect that he said anything.

Q. How long were you four in talk that morning?

A. Mr. Cooper and Mr. Nahale walked over and through the mill and I think Mr. Conant joined them; I did not.

Q. Oh, you left, you left them there?

A. And they came back to where I was; they came back to where I was.

Q. Oh, so you remained outside for a while and they came out again, is that it?

A. Yes.

Q. And then you separated?

A. Then after the conversation which I have testified we separated, Mr. Cooper and Mr. Nahale turned one way, they had come up, the road on the north boundary of Waiaha and Mr. Nahale.—Mr. Conant and I walked back across the other Kapiolani street land to the road.

Q. Were the same four present at that time?

A. Well, a part of it they were two and two; Mr. Conant left, going one way, and they the other.

Q. Well, as I understand it, there was talk between you and Mr. Cooper and then three of them went into the mill, you remained outside, and then those three came out and joined you again, outside, and there was more conversation; wasn't that what you said?

A. We only had conversation one time. Now—At our first meeting there was nothing said; Mr. Cooper and Mr. Nahale were
728 walking around and went into the mill, and I think Mr. Conant left me and walked into the mill with them, and they came back to where I was; then the conversation occurred. Then this notice was served and the conversation which I have narrated.

— So that you recall that, now, the conversation to which you have testified as having occurred that morning occurred after those three had come back from the mill?

A. They had been walking over the mill, yes, and through the mill, yes.

Q. And after that conversation you paired off, two of you went one way and two the other?

A. Two the other, yes.

Q. And that was all the conversation you had with Mr. Cooper that day?

A. That was all.

Q. Did you see him again that day or not?

A. Yes, as I was going home up the road he passed me in the— in a hack, and I think I was walking.

Q. What's that?

A. I was walking and there was no remarks passed between us when he passed me. He passed—we were both going the same direction but he passed me.

Q. Didn't see each other, I suppose?

A. Oh, I turned to him, I don't think he saw me.

Q. At any rate you are sure there was nothing said?

A. There was nothing said, no.

Q. Now, Mr. Scott, isn't it the fact that on Saturday, the 21st of May 1904 you told Mr. Cooper that you would not deliver any of this property for which he had taken up execution?

729 A. I certainly told him nothing of the kind. I told him the exact contrary; I am sure of that; I remember it as vividly as I remember your question now.

Q. You deny positively that at any time on Saturday the 21st of May, or Monday the 23rd of May, 1904, at Kailua or in the vicinity of the premises of the Kona plantation you told Mr. Cooper that you would not deliver any of that property?

A. I deny that I ever told him at any time or at any place or on any occasion that I ever told him such a fact, positively.

Q. Or did you tell him anything to that effect?

A. I told him that in very plain words I am——

Q. Aha! Eh?

A. What do you mean, to that effect? I don't know whether I catch the question.

(Question read.)

A. Well, I don't know what, the meaning of that is, when I come to think of it now. What do you mean by that question?

Q. You didn't tell Mr. Cooper at any time anything to the effect that you would not return any of that property?

A. No, I never told him anything to that effect; in fact I told him the exact contrary, in very plain words.

Q. You were interested in the Kona Sugar Co. from its inception, were you not?

A. Not as a stockholder; I never was a stockholder.

Q. Oh, weren't you ever a stockholder?

A. I never was; I was a creditor.

Q. Creditor and a landlord?

A. No, not a landlord; a creditor only.

730 Q. Didn't you lease any lands to the Kona company?

A. I did not.

Q. Or your wife?

A. I assigned some leases to them at one time, during their——

Q. Did you lease any lands from your wife?

A. No, there was some lands assigned, some leaseholds assigned to them, but the assignment terminated our interest in them.

Q. Some leases assigned by you to the Kona sugar company?

A. And by my wife.

Q. Leases of land that you and your wife held, and you assigned those leases to the Kona Sugar Co., is that what you mean?

A. Yes.

Q. But no lands of your own were leased to that company?

A. No.

Q. And no lands of your wife's?

A. No.

Q. Were leased. Then you had no interest in this property prior to the purchase at the receiver's sale, is that it?

A. No, nothing; only a creditor of the corporation, the Kona Sugar Co.

Q. Then you were interested in the property from the time of the purchase at the receiver's sale until you finally sold it to Hutchins?

A. I was.

Q. Let's see. You were receiver before Mr. Dortch?

A. Yes.

Q. Mr. Dortch was the receiver that held the sale?

A. Yes.

731 Q. How long were you receiver?

A. Seven months.

Q. How was it that Mr. Dortch succeeded you?

(Ob. sus.)

Q. How was your receivership terminated?

(Ob. sus.)

Q. What is your present occupation, Mr. Scott?

A. Well, I have been a cane planter for the last two or three years.

Q. You have been?

A. Yes.

Q. At Kona?

A. In Kona.

Q. How long since?

A. I began planting there in October of 1904, for seed, planted in 1905 and 1906.

Q. Well, the question was, what is your present occupation?

A. Well, I have been a cane planter and am negotiating the closing out of that just now.

Q. Well, you have been a postmaster, haven't you?

A. I was postmaster at one time, yes.

Q. Well, don't you see that this is a very simple little question. What is your present occupation?

Mr. WITHINGTON: He says he is closing out.

The COURT: You are a cane planter at the present time, then?

A. Well, I am virtually—it is virtually out of my hands; we are—

Mr. ROBERTSON :

Q. That is what I understood when you said you have been a cane planter.

732 A. Yes.

Q. That would naturally lead to the inference that you were not now. I understand that you also had been a postmaster, but the question is, what is your occupation.

A. It is winding up the past affairs, the only thing I am engaged in just now.

Q. What are you, a stem-winder or key-winder? You have nothing to do but to wind up the past?

A. Winding up the affairs of the past.

(Adjournment to tomorrow morning.)

MAY 15, 1908.

Q. Mr. Scott, I understood you to say that since you sold to Hutchins you have had no further interest in this property?

A. Ever since.

Q. Haven't any interest in this suit of any kind?

A. None whatever.

Q. At the present time.

A. None whatever in this suit. I might have been as a beneficiary under Hutchins, trustee on his bond, but this suit, I understand this is not—is not against him as trustee now.

Q. Well, what do you mean when you say you may have had an interest as a beneficiary on Hutchins' bond?

733 A. That is a bond, if Hutchins as principal and on the bond, redelivery bond, Hutchins as trustee, if he had been held on the bond I suppose I, as a beneficiary under him, would have been liable; otherwise——

Q. Well, you are referring to the redelivery bond?

A. Redelivery bond.

Q. Well, so you claim that you have no interest whatever in the outcome of this present suit, is that it?

A. None whatever.

Q. Weren't you a surety on Mr. Hutchins'—on his bond on his appeal?

A. I was on—yes, I was.

Q. I am referring now to plaintiff's Exhibit "F" in this case, M. F. Scott, surety. That is your signature, is it not?

A. It is.

Q. And you understand that this is the bond for costs on appeal in the replevin case, do you?

A. I do.

Q. Don't you understand that some seven hundred and odd dollars, a judgment for some seven hundred odd dollars for costs under this appeal have been entered in the supreme court of this Territory?

A. I don't know anything about it.

48.

Q. You don't know anything about the costs of this appeal having been taxed and adjudged at upwards of \$700 against you and Hutchins?

A. I was not aware of it, no. I would like to look at the bond before answering any further.

(Document shown to witness.)

Q. You mean to say that you are not aware of that fact, is that it, Mr. Scott?

734 A. Well, my recollection of it is that I executed that bond for what it purports to be, and was told that it was rejected and another bond in lieu of this one for the sum of twenty—forty thousand dollars was executed by Mr. Hutchins, on which there were other bondsmen, which I couldn't have qualified on; I couldn't have qualified on that bond, and I was told that that was substituted in lieu of this one, and I didn't know that this one was valid.

49.

(Answer stricken as not resp.)

Q. Your answer has been stricken out, Mr. Scott, because it is not responsive to the question and the question has been repeated to you. Will you answer it, please.

A. I don't know anything about that, but if there is any liability on that bond, and it applies to this suit, I am liable to that extent.

Redirect examination.

Mr. CATHCART:

Q. In connection with the bond on appeal and motion for new trial that has just been shown to you by counsel, I show you plaintiff's Exhibit "K" and call your attention to the two documents in the exhibit contained, first the order and second the motion, and ask you if that revives your recollection at all as to any responsibility on the bond shown to you by counsel?

A. This does.

Q. It does refresh your memory?

735 A. These papers I had read at that time, *I had read at that time*; and it was from my knowledge of these that I answered; that refreshes my memory, yes.

Q. And state now what your memory is as refreshed by these documents, in reference to that bond that has been shown to you.

50.

A. When I answered as I first did I had in mind the facts which are set forth in this motion and order, which motion and order I had seen, and I believed when I answered that that bond which had been shown me had been set aside by the order of the court and another bond ordered to be substituted; that is my understanding.

Q. This order which I have shown you?

A. Yes.

Q. In reference to these so-called Paris lands, that is the lands which Mr. Paris, John D. Paris, owned, or the interests which he represented in the lands, what have you to say as to the plaintiff in this action having had knowledge that none of the Bierce rails, so called, were on those lands, and whether that knowledge that it had was prior to the 21st and 23rd day of May 1904? Can you say anything as to that?

A. Yes. Yes, at the trial of the replevin suit——

Q. Now state if you can how you know that that knowledge of or information that none of the rails of the Bierce Ltd. were on these Paris lands or the lands which Paris held control of?

51. (Ob. sus.)

[(Mr. Scott's evidence taken on repl. suit read.)]

Q. You have heard what I have just read to the jury, as your testimony given in the replevin suit when you were called
J. L. H. on the stand as a witness for the plaintiff, have you not?

A. I have.

736 (All of Mr. Scott's testimony just read to jury stricken with exception of that in regard to Paris lands.)

Q. Mr. Scott, having heard me read the testimony that you gave in the replevin suit, purported to give in the replevin suit, relative to the Paris lands and rails of the Bierce company on the Paris lands and Paris interest lands, I will ask you if that testimony is true; if you gave it as I read it there?

A. I would like to look at it if I can, again.

J. L. H. Q. Look at the testimony?

A. Can I look at it?

All the testimony you have read, of mine regarding the Paris lands and the Bierce rails there mentioned, the Bierce rails whether on the Paris lands or not, is true.

Q. And it was given at that trial as I read it?

A. It was given at that trial.]*

Q. You were a witness at that time for the plaintiff in that case?

A. I was.

52.

Q. You have stated on your cross examination that some miles of these Bierce rails were laid by you as receiver of the Kona Sugar Co., and that one of the locomotives was taken there by you and set up and used there. Will you state under what authority you laid the rails and took the locomotive?

A. The laying of the rails was by an order of the court. The bringing of the locomotive from Honolulu, where it was held for freight charges of the steamer that brought it to Honolulu, was by the advice of the advisory committee, which was — whose advice I was ordered to follow by the order of the court, to have this

737 locomotive there on the ground in case of a break or emergency to have the two locomotives.

[* Words enclosed in brackets erased in copy.]

Q. And at that time and while you were receiver there I will ask you if you were acting under the direction of the advisory committee that you have named?

53.

(Ob. sus.)

Q. Do you know where the original of this exhibit is?

[(Exhibit "A" attached to petition.)]*

A. I don't know where it is now. I have seen it, had it in my possession at one time.

Q. Had it in your possession a long time?

A. At one time.

54.

Q. Do I understand you to say you don't know where the original is, Mr. Scott?

A. I do not.

Q. Do you remember when you last saw it?

A. I don't remember whether I have seen it since 1902 or not. Can't recall.

Q. Do you remember where you last saw it?

A. I do not surely.

Q. Was it in town here or in Kona?

A. I think it was in Kona.

Q. In your cross examination you said that a Mr. Linder subsequent to this 23rd day of May 1904 and as I remember it along in July of that year, harvested certain cane that was down there and made use of this Bierce railway, so called. I ask you to state, if you know, by whose authority he used the railway and whether or not it was by the authority of yourself or the defendant in that action, Clinton J. Hutchins, Trustee? Answer the question if you know, Mr. Scott, of your own knowledge.

738 A. I know certain facts, yes.

Q. State those facts then.

A. Mr. Linder—

Q. The question is, Mr. Scott, do you know by whose authority he did as has been enumerated in the question by what authority or whose authority. Answer that by yes or no.

A. Well, if your Honor please, I know in part the authority.

Q. But not the entire?

A. But perhaps not the entire authority.

Q. State whether you know whether he had any authority from yourself or from the defendant in the action, Clinton J. Hutchins, Trustee? Answer only, of course, the question within your knowledge, Mr. Scott.

A. I know that he had no authority from myself or Mr. Hutchins to use any of the rails, Bierce rails, or the railroad equipment, rolling stock.

[* Words enclosed in brackets erased in copy.]

Q. On this property in question that you have spoken about, this Kapiolani Tract, so called, will you state whether or not you had entered upon that land before or after the 23rd day of May 1904?

55.

(Ob. sus.)

Q. Did you see Robert Colburn there that morning, the morning of the 23rd?

A. I did.

Q. Did you have any conversation with him that you remember?

A. He told me not to go onto Waiaha. I made no reply and did not enter on Waiaha.

Q. Were you at that time endeavoring to go on the land? Before he told you?

A. No, I did not attempt.

739 Q. Now that was at what time in reference to the conversation you had with Mr. Henry E. Cooper and Nahale when you served the notice on him?

A. It was before, before Mr. Cooper and Mr. Nahale had arrived.

Q. Before they had arrived?

A. Before they had arrived that morning, yes sir.

Q. When you had the conversation with Mr. Nahale and Mr. Cooper and served the notice on them, was Robert Colburn there?

A. He was not there.

Q. Well, do you know where he was at that time, that is what I want to know, if he was there in the neighborhood where you saw him or within hearing distance.

A. Yes, he was at the mill. When Mr. Cooper and Mr. Nahale came up the north boundary of Waiaha I was at the south boundary; Mr. Colburn left and walked over to them and they and he together went into the mill. Mr. Conant also went over to the mill, or in the direction of the mill, and Mr. Conant, Mr. Cooper and Mr. Nahale returned to me, and there were no others present during our—our conference or meeting.

Q. Or within hearing?

A. Or within hearing.

Q. What distance was Mr. Colburn away?

A. More than 200 feet.

Q. You stated on your cross examination that on the morning of the 23rd of May 1904, that Monday morning, that you got Conant to go with you to where you were to meet Judge Cooper and Nahale, and you also said that his going there to witness the notice, the mere handing of the notice, was a minor matter in your estimate.

740 What else did you want him to go there for, if anything?

A. Well, from what an officer from Mr. Nahale said to me on Saturday afternoon I was ready to think that they were not acting in good faith, and I wanted a responsible party there to witness what was transpiring.

(Stricken as not brought out on proper redirect.)

J. L. H. Exception by defendants.

Recross-ex.

Mr. ROBERTSON :

Q. Mr. Scott, you said this morning that Mr. Linder had no authority from Mr. Hutchins to use this railroad property. How do you know that?

A. From a conversation with Mr. Linder—with Mr. Hutchins.

Q. That is, your statement to that effect this morning was based on something that was told you by Mr. Hutchins?

A. Mr. Hutchins and I discussed that.

Q. Well, who was present at that conversation?

A. On one occasion Mr. Cathcart was present.

Q. Nobody else?

A. No one else; no one else that I recall.

56.

[(Testimony of witness that Linder had no authority from Hutchins stricken.)

(Albert Waterhouse rec.) (J. A. Thompson rec.)]*

741 Direct examination of E. E. CONANT, called and sworn.

Mr. CATHCART :

Q. Mr. Conant, on May 21st, 20th and 23rd of 1904 where were you living?

A. In Holualoa, Kona, Hawaii.

Q. Island of Hawaii?

A. Island of Hawaii.

Q. Were you then acquainted with Mr. M. F. Scott?

A. Yes sir.

Q. Did you know Mr. Henry E. Cooper?

A. I did.

Q. Did you know Mr. J. K. Nahale, the sheriff?

A. I did.

Q. Of that Island?

A. Yes sir.

Q. On the 23rd day of May 1904 did you see Mr. Scott?

A. Well, I am not exactly sure as to dates.

Q. Do you remember the day of the week?

A. It was Monday.

Q. Monday.

A. I am under the impression it was the 23rd, but as I say, I would swear absolutely; I am not absolutely sure of it.

Q. But you are under the impression it was the 23rd?

A. I am pretty sure it was, yes.

Q. On that Monday where was it that you first met Mr. Scott?

A. At the postoffice. He was postmaster. I think it was
742 steamer day, and I went down to mail some letters.

Q. That was the 21st or 23rd?

A. On the 23rd of May if I remember right.

[* Words enclosed in brackets erased in copy.]

Q. On Monday?

A. Monday.

Q. Did you then go anywhere with Mr. Scott?

A. I did.

Q. How did you happen to go with him?

A. Mr. Scott requested me to accompany him down to the mill.

Q. Did he state what for?

A. Yes.

Q. What was it?

A. He was going to tender the railroad to Mr. Cooper, the property.

Q. And you went with him down to the railroad?

A. I did.

Q. And who if anybody did you meet there?

A. We walked along the railroad track toward the mill, and we came to a fence that had been put across on the boundary line, and Mr. Robert Colburn who was at that time in charge of the Kapiolani Estate property met us at that fence and told Mr. Scott that he could not come any further, but he says, "You, Mr. Conant," he says, "You can go on through if you wish."

Q. What then did you do?

A. I think that I jumped—I am not absolutely sure of this either but I am of the impression that I jumped over the fence and walked a ways inside and then came back again and was standing there talking with Mr. Scott.

Q. And did anybody come there then?

A. Mr. Cooper and Mr. Nahale made their appearance.

743 Q. What if anything was said at that time and place by Mr. Scott to Mr. Cooper?

A. Well, Mr. Scott says, "Mr. Cooper, I tender you this property. There it is," he says, "take it."

Q. Anything further?

A. Well, Mr. Cooper says "Mr. Sheriff" he says "I refuse to accept this property." If you want the whole balance of the conversation I can give it to you, because that is thoroughly impressed upon my memory.

Q. We will take that in a moment. The first thing that was said was by Mr. Scott, was it?

A. It was.

Q. And that was, as you have said, the tender of the property to Mr. Cooper?

A. Yes.

Q. Did you see any paper in Mr. Scott's hand?

A. Mr. Scott had a paper in his hand, yes.

Q. What if anything did he do with it?

A. He gave it to Mr. Cooper.

Q. And at what time in the conversation?

A. Well, I don't remember that part of it; about the time that he made the tender, if I—my recollection.

Q. Did Mr. Scott say anything in reference to aiding in delivering the property to him?

A. Yes, Mr. Scott, says "I will assist you in taking the property if you wish."

Q. And then was it that Mr. Cooper said to Nahale—What was it he said? Give us all that he said.

A. Well, at the time Mr. Scott made the tender he kept on talking, and he says "I will assist you in securing this property if you
744 so wish." And then Mr. Cooper made the remark that I just stated.

Q. Well, give us that remark again.

A. "I refuse to accept that property, Mr. Sheriff." He says, "It is not owned by Mr. Scott, Hutchins or anybody else."

Q. Is that all of the conversation that you can remember?

A. That is about all I can remember. I remember that Mr. Cooper was a little bit excited.

Q. What?

A. Mr. Cooper was—became a little bit excited and there was a great many things said there but I don't recollect them.

Q. Did you see who was present there when this conversation took place and when Mr. Scott handed the paper to Mr. Cooper?

A. There was Mr. Cooper and Mr. Nahale, that is right within a few feet.

Q. And yourself and Mr. Scott?

A. And Mr. Scott on one side of the fence and Nahale and Mr. Cooper on the other side.

Q. Do you know Robert Colburn?

A. Yes sir.

Q. You say he was there when you and Scott first got down to the place. Do you know where he was at the time of the conversation?

57.

A. He was sitting on one of the cars about two or three hundred feet back on the track.

745 Cross-examination.

Mr. ROBERTSON:

Q. Do you remember, Mr. Conant, what time of day it was you went over with Mr. Scott?

A. In the forenoon.

Q. Sometime during the forenoon was it?

A. Yes.

Q. Would you say near noon or earlier?

A. Well, it was somewhere around 10 or 11 o'clock.

Q. How did you go from the postoffice where you say you met Scott over to the fence where you saw Colburn?

A. How did I go?

Q. Yes.

A. I rode down to the railroad and then walked in.

Q. Horseback you mean?

A. Horseback.

Q. Scott ride on horseback?

A. Well, I don't remember that; I don't remember whether it was horseback or whether he was walking.

Q. Well, did you two go together from the postoffice to that fence or did you go singly and separately?

A. Well, I don't really recollect that; I think, though that I met Mr. Scott at the railroad crossing and we went in together from there; it is a walk about quarter of a mile I should say.

Q. As I understand you, you said that you met Scott at the post-office?

A. That morning, yes sir.

Q. And he told you that he was going over there to the railroad, is that it?

746 A. That was it.

Q. Well, did he say "Come along with me," or did he say "Meet me over there"?

A. He said to "meet me at the crossing" or "meet me down at the railroad, this fence."

Q. So you and Scott separated for a while?

A. Yes.

Q. And then met again over at the other place?

A. Yes.

Q. Where was this place that you refer to?

A. It was on the boundary line of Kahului; the Kapiolani Estate had secured control of the——

Q. Yes, you mean the land of Kahului?

A. Yes.

Q. And Colburn was there in possession of that land in behalf—representing the Kapiolani Estate?

A. Yes.

Q. Do you remember whether that land was also fenced on the other side, that was where the—both boundaries?

A. Yes, both boundaries.

Q. Clean across where the track had run?

A. Yes.

Q. And the track had been partially taken up at that time, had it not?

A. Not at that point, no; not to my knowledge; I didn't see anything of that kind.

Q. Don't you remember, Mr. Conant, that just within the—about inside the boundary lines of the Kahului land, which you say had been fenced, that some of the rails had been taken?

A. No, I didn't see any of the rails taken up.

747 Q. You didn't notice that?

A. Didn't notice it.

Q. Did you see that they had been loosened and laid over on the ground?

A. I didn't see anything of the kind; I wasn't looking for that.

Q. That might have been the situation without your noticing?

A. That may have been.

Q. But you are sure that both boundaries were fenced?

- A. I am sure of that; I climbed over one of the fences.
- Q. How far into the Kahului land did you go?
- A. It went beyond the mill, right through in the cane carrier, there was another barrier there.
- Q. Oh, is the mill on the land of Kahului?
- A. Yes, Kahului or Waiaha, I don't remember—recall now which.
- Q. At any rate one of the Kapiolani Estate lands?
- A. Yes, Kapiolani Estate.
- Q. Now as I understand it, when you got there and got over the fence in onto the Kapiolani Estate lands, Colburn was there?
- A. Yes.
- Q. Did you notice whether he was armed or not?
- A. I did not; there was nothing visible that I could see.
- Q. Where was Scott when Colburn told him that he could not come into the land?
- A. Right up to the fence.
- Q. On the outside of the fence?
- A. Outside, yes.
- Q. And Scott remained there when you went in?
- 748 A. Yes sir.
- Q. How long were you in there?
- A. I took a walk up along the track and went as far as the mill and turned around and came out again; simply a matter of curiosity as far as I was concerned; I had had charge of the mill previous to that.
- Q. You were not making any official entry?
- A. No.
- Q. For any legal purpose?
- A. No sir.
- Q. Or anything like that?
- A. No.
- Q. So you came out and got over the fence again, did you?
- A. I did.
- Q. And rejoined Scott? How long after that did Cooper and Nahale come along?
- A. Oh, it wasn't five or ten minutes.
- Q. Were you and Scott still standing by the fence?
- A. Yes.
- Q. Do you remember that Scott started to get over the fence and Colburn warned him off?
- A. I remember it quite well, yes.
- Q. Do you remember whether he got clean over the fence or only partly over?
- A. I think he got one leg over.
- Q. That's all he did get?
- A. That's all he did get.
- Q. When Colburn told him to skiddoo he skidded?
- A. He did.
- Q. I think you have stated that you and Scott were there when Nahale and Cooper came along?

749 A. Yes.

Q. And is that where this conversation that you say occurred?

A. Yes sir.

Q. During the conversation between Cooper and Scott where was Nahale?

A. Right alongside of Mr. Cooper.

Q. Did he take part in the conversation?

A. No, not—I didn't hear him in discussion between the—the others.

Q. He might have said something but you not have heard it?

A. He might have said something, yes, and I don't recall it now.

Q. Yes. When you went in on this Kapiolani Estate land how much of this railroad property did you see there, or what portion of it?

A. Well, there was locomotives, cars——

Q. One or two locomotives, do you remember?

A. Well, there might have been two. I don't—I suppose they were both there; I didn't take particular notice, I just simply walked through and out, as I say.

Q. You are entitled, Mr. Conant, to speak to the best of your recollection. Now I will ask you whether to the best of your recollection both those locomotives were on the track, on that land?

A. I couldn't swear that they were there at all. I know that there were some cars there but as far as the locomotives were concerned I wouldn't swear that they were there on the yard at all, because I wasn't looking for that and I didn't notice.

A. Anything else that you recollect of besides the cars?

750 A. Well, in rolling stock?

Q. Yes, anything in connection with this Bierce railway material?

A. No, I have no recollection of anything else outside of the cars.

Q. You didn't pay particular attention?

A. I did not. I wasn't looking for that purpose at all.

Q. How long were you four there together, would you say?

A. Beg pardon?

Q. How long were the four of you there together, would you say?

A. Oh, I don't know; ten or twenty minutes, I suppose.

Q. Then where did you go?

A. I went off and got on my horse and went home. I left Mr. Scott at the railway crossing without—right outside.

Q. Were Cooper and Nahale still there?

A. They left them there—my recollection is that we left them there on the opposite side of the fence; in other words on the Kapiolani Estate land.

Q. So that you were the first of the four that were there to leave the place; you were the first of the four to leave the spot?

A. That is my recollection.

Q. How far from the mill, Mr. Conant, was this fence on the Kapiolani Estate land, just outside of which this conversation took place?

A. Well, as you understand, there was a fence on each side of the mill.

Q. Yes?

A. Now there's a fence what we might call the back side and the front side; the front side, that is where we had this
751 conversation; it was say about three or four hundred feet, possibly, from the mill proper.

Q. And how far was the fence on the opposite side from the mill?

A. Well, if I remember correctly about at the end of the cane carrier, possibly a little beyond.

Q. About how far in feet or yards would that be, approximately?

A. Well, that would practically be right at the mill.

Q. I see, so that one fence was just outside of the mill on one side and the other was the distance you have given in the opposite direction?

A. Yes.

Q. Now this entire conversation between Cooper and Scott occurred at that one point?

A. At that one point; that is this—all that I heard.

Q. While you were there at any rate?

A. Yes sir.

Q. When you separated from them they were still at the same point where they first met, is that it?

A. Who do you refer to, Mr.—

Q. Scott and Cooper and Nahale.

A. When I left them?

Q. Yes?

A. No, Scott accompanied me out to the railroad crossing and I got on my horse and left and I think that Mr. Scott walked away.

Q. I see. Not being familiar with the premises I didn't catch that. Well, how far was this railroad crossing where you separated from Scott—

A. I should say—

752 Q. —from the point where the conversation occurred?

A. About quarter of a mile.

Q. Oh, I see. Then is this it, then, that you and Scott left the point where the conversation occurred, leaving Nahale and Cooper there, and you and Scott went to the railroad crossing?

A. Yes sir, out to the road, the government road.

Q. On the government road, I see; and there you two separated?

A. There we separated.

Q. You went home?

A. Yes.

Q. So that the entire meeting between Scott and Cooper began and terminated at the same point?

A. Yes sir.

Q. Just outside the Kapiolani Estate fence?

A. As far as I know anything about.

Q. You didn't see them together at any other point?

A. No.

Redirect.

MR. CATHCART:

Q. Mr. Conant, where this conversation took place was outside the fence, was it?

A. Well, Scott and I were on one side and Mr. Cooper and Nahale were on the other.

Q. They were on the—on the other side of the fence?

A. Yes.

753 Q. When you and Scott separated there where the government road crosses the railroad track, the crossing about a quarter of a mile from where the interview took place, which way did Scott go, do you know?

A. I don't know. I was on horseback; I got on my horse and—

Q. Went off?

A. Galloped up the road; left him.

Q. How close were you four together during the time of the conversation?

A. 10 or 12 feet apart, I should say.

Q. Right close?

A. Yes.

Q. And how did Mr. Scott give the notice or the paper to Mr. Cooper?

A. Well, he walked up to one side of the fence, Mr. Cooper came up the other,—handed it to him.

Q. Well now when they were talking together how close were they?

A. During the time of this general conversation?

Q. Yes, the conversation you spoke about.

A. Well, Mr. Cooper walked back a little and they stood there, as I say, 10 or 12 feet apart, I should say.

Q. At the time of this conversation did you take any memorandum of the refusal of Mr. Cooper?

A. I did.

Q. Have you that with you?

A. I have.

Q. Why did you take that down?

58.

(Ob. sus.)

754 (*Appendix to Testimony of M. F. Scott, Showing Objections, Rulings, and Exceptions, etc.*)

1. MR. PROUTY: I object to the question, if your Honor please. This relates to a period in 1903, long before the date of judgment in replevin.

(Objection overruled; exception by plaintiff.)

2. Mr. PROUTY: I object to that, if your Honor pleases; the receiver cannot be proved in that way.

(Objection overruled; exception by pl'ff.)

3. Mr. PROUTY: I object to going into the history of that, if your Honor pleases; the witness has already gone far enough to show his knowledge and location of the property.

4. Mr. PROUTY: Now I move to strike out all of the witness' answer because it relates to a time prior to the recovery of the judgment in replevin in this case, and that judgment is conclusive upon these parties.

(Motion to strike denied; exception by plaintiff.)

5. Mr. PROUTY: I move to strike out the statement of counsel that he understands that he laid part of the rails and set up the cars and locomotives, on the same ground stated in my motion to strike out the answer of the witness.

(Motion to strike denied; exception by plaintiff.)

6. Mr. PROUTY: I renew the objection on the same grounds, and on the further ground it is leading and suggestive to the witness.

(Objection overruled; exception by plaintiff.)

7. Mr. PROUTY: I object on the same grounds, incompetent.

(Objection overruled; exception by pl'ff.)

755 8. Mr. PROUTY: I object to that, if your Honor pleases, on the ground that it relates to a time prior to the rendition of the judgment.

(Objection overruled; exception by pl'ff.)

9. Mr. PROUTY: I object to that, if your Honor pleases incompetent. I further object to it because it relates to a period prior to the rendition of the judgment; immaterial what his authority was at that time. I understood his testimony was to show his knowledge of and familiarity with the situation of the property.

Mr. CATHCART: To show also that it continued thereafter right down. That is not alone the purpose of the question to show the length of time that he was the agent and that he was afterwards the agent, but to show the special reason why he was familiar with the property, his agency out there.

The COURT: Then the objection overruled, of course, with that understanding.

Mr. PROUTY: If your Honor please, I want to object further, that what occurred between Mr. Hutchins at any time prior to the rendition of this judgment is immaterial.

Objection overruled; exception by pl'ff.)

The COURT: Do you recall the question?

A. I scarcely do.

(Question and answer read.)

A. I was a beneficiary under the trustee and had authority——

Q. You say "the trustee"; you mean the receiver, I suppose, do you not?

A. No, the trustee, Mr. Hutchins, and——

Mr. PROUTY: I move to strike it out, if the court please.

(Motion denied; exception by pl'ff.)

Mr. PROUTY: Also states a conclusion of the witness.

756 (Objection overruled; exception by pl'ff.)

10. Mr. PROUTY: I move to strike out the answer, if your Honor please, as hearsay.

(Motion denied; exception by pl'ff.)

11. Mr. PROUTY: I object to the statement it was sent to him. He didn't know who prepared it, by the firm of anybody.

Mr. CATHCART:

Q. How did you receive it?

A. It came to me from the office of Kinney, Ballou & McClanahan, by the hand of Cecil Brown.

(Objected to.)

Q. You stated that it came from Kinney, Ballou & McClanahan by the hands of Cecil Brown. Do you know that it came from Kinney, Ballou & McClanahan from anything you learned from them?

Mr. PROUTY: I object to the question as suggestive.

Mr. CATHCART:

Q. How do you know then? I merely wanted to shut off any hearsay.

Mr. PROUTY: I object to his answering it at all. The counsel has no business to put the answer in the mouth of the witness and then back off and ask him a proper question.

(Objection overruled; exception by pl'ff.)

A. My recollection is that there was a letter, I am sure there was a letter accompanying this, with a request—

Mr. PROUTY: I object to the statement of the contents of the letter.

The COURT: That would not be evidence.

757 Mr. CATHCART:

Q. Do not state what the request was, but state whom it was signed by, if you can remember.

Mr. PROUTY: I object to that. The letter will show for itself whom it was signed by.

(Objection sustained.)

Mr. CATHCART:

Q. Do you know what has become of that letter?

A. It is—it is lost, that is, I haven't seen it for years. I have had occasion to go through all of my papers within the last six months and I have at various times since that time destroyed certain papers which I didn't regard as of further use, and the letter is not in existence now, or not in my possession.

The COURT:

Q. Did you make special search for it?

A. I was not searching specially for this paper, no; it was for other papers.

Mr. CATHCART:

Q. Was it only by means of that letter that you say you knew that this document had come from Kinney, Ballou & McClanahan?

A. That; that and the mark on the papers, this was the only evidence I had. I cannot remember, I think Mr. Brown informed me too at the same time——

The COURT: What Mr. Bworn told you would not be——

A. Mr. Brown told me——

The COURT: That would not be evidence, Mr. Scott.

Mr. CATHCART:

Q. Pursuant to the letter did you do anything with this document, take any action?

758 Mr. PROUTY: I object to the question as calling for a conclusion, that he did something pursuant to a letter which has not been proved.

(Objection sustained.)

Mr. CATHCART:

Q. What name was signed to that letter?

Mr. PROUTY: I object to that as calling for secondary evidence.

Mr. CATHCART:

Q. What name was signed to that letter if you know?

Mr. PROUTY: I object to that as calling for the contents of a written instrument; incompetent, irrelevant and immaterial.

(Objection sustained.)

Mr. CATHCART:

Q. Have you ever seen the signature of Kinney, Ballou & McClanahan and can you state whether or not you are familiar with it and can recognize it?

(Objected to as immaterial; objection overruled, exception by plaintiff.)

A. The firm name, Kinney, Ballou & McClanahan, is signed in a great many handwritings and by a great many different persons——

The COURT: Probably each member of the firm had authority to sign the firm name.

A. And frequently the correspondence which I saw was signed by——

Mr. PROUTY: I object to you stating what was signed to correspondence you saw.

The COURT:

Q. You had correspondence with the firm?

759 A. I had, your Honor, and saw considerable correspondence of theirs. It was sometimes signed in one——

Mr. PROUTY: Don't state how it was signed. I object to that.

Mr. CATHCART:

Q. Can you now state whose signature that was to the letter?

(Objected to; overruled.)

A. I can't.

Q. Don't know what the signature was?

A. It was Kinney, McClanahan and——

(Objected to as calling for the contents of a written instrument. Objection overruled; exception by pl'ff.)

A. It was signed Kinney, Ballou & McClanahan.

Mr. PROUTY: I object to that.

A. But I don't remember the handwriting of the party who signed the firm name; I don't remember.

Mr. PROUTY: I move to strike out the answer.

The COURT:

Q. Are you able to say that it was the genuine firm name?

Mr. ROBERTSON: That is not the point, your Honor, the genuine firm name?

The COURT: Well, whether it was by some member of the firm.

Mr. PROUTY: Your Honor means the genuine signature of the firm?

A. It impressed me at the time as being genuine, and I can't say further than that.

Mr. PROUTY: I move to strike out the answer as to how it was signed and by whom. The former answer; he said it was signed by Kinney, Ballou & McClanahan.

The COURT: Motion to strike will be granted.

Mr. CATHCART: I would ask that this document be marked 760 for identification.

(Marked "9" for identification.)

Mr. PROUTY: I move that the answer of the witness that he received the instrument marked for identification No. 9 as from the office of Kinney, Ballou & McClanahan, from the hands of Cecil Brown, I move to strike out so much of it as states that he received it from the office of Kinney, Ballou & McClanahan.

The COURT: The motion is granted and it will be stricken out.

Mr. LEWIS: Exception.

The COURT: Exception allowed.

12.

Direct examination of J. A. THOMPSON, recalled.

Mr. CATHCART:

Q. You have already been sworn in this case.

A. Yes sir.

Q. And already told us your occupation?

A. Yes sir.

Q. I hand you document marked for identification No. 9, and ask you if that is a record of the court?

A. It was taken from the files in the case of McChesney & Sons versus the Kona Sugar Co. the other day by me at the request of Mr. Withington. The fact was he came in there and wanted the petition and an order in this case——

761 Q. And that——

A. And this morning I brought it into court.

Mr. CATHCART: We offer that in evidence, if the court please, and ask it be marked Exhibit——

Mr. PROUTY: I understand this witness is not the keeper of the records of the circuit court of the third circuit.

The COURT: But I understand they have been transferred.

Mr. PROUTY: No, if your Honor please.

Mr. CATHCART:

Q. This is part of the records of the supreme court, is it not, here now Mr. Thompson?

Mr. PROUTY: I object to the question on the ground that it shows on its fact that it is not a part of the records of the supreme court.

Mr. CATHCART:

Q. Are you the official custodian of it, Mr. Thompson, of this paper?

A. All papers in the office.

Q. Well, isn't that a paper that belongs to the office here?

A. In the general office, yes, among our files in there, and I took it from the general office this morning.

Q. I call your attention to this mark, this stamp, and ask you what that is?

A. That was put on by Mr. Smith after the—It was taken from the office into the court room here and then returned to the general office again, and Mr. Smith put that on, I think.

Q. This file that you are talking about, it came up in the supreme court?

A. Up in the supreme court here.

762 Mr. ROBERTSON: Are you testifying now? The witness hasn't said that.

Mr. CATHCART:

Q. You say that you are the general custodian of all papers there and this is coming from your custody, is that right?

A. Of all papers filed in the office, yes, one of the custodians.

Q. One of the custodians, and this paper came from your office, did it?

A. This morning.

Mr. CATHCART: We renew our offer, if the court please.

(Argument. Offer withdrawn.)

Q. Do you know how it came into your custody?

A. I can't now without looking through the files.

Q. Will you go out for a moment and look through the files and inform yourself how it came into your custody.

The COURT: Of your own knowledge; not what someone told you.

Direct examination of M. F. SCOTT resumed:

13. Mr. PROUTY: Move to strike out the answer that he was an agent of Mr. Hutchins, on the ground it is a mere conclusion of the witness and not the best evidence.

(Motion denied; exception by pl'ff.)

14. Mr. PROUTY: I object to that as incompetent, irrelevant and immaterial, and it was made at the time, while the execution offered in evidence was outstanding and as I understand it in the hands of the sheriff, and it is incompetent to contradict the officer's return on that writ.

(Objection overruled; exception.)

763 15. Mr. PROUTY: I object to that; I object to his stating his conclusion.

(Objection overruled.)

16. Mr. PROUTY: I object unless he states how he knows what they were.

(Objection overruled.)

17. Mr. PROUTY: I move to strike out the answer of the witness because it does not state his personal knowledge at all and don't purport to.

(Motion denied; exception by pl'ff.)

18. Mr. PROUTY: He should state his means of knowledge.

(Objection overruled; exception.)

19. Mr. PROUTY: I object and move to strike out the answer as necessarily stating the contents of a record, as to what property or subject-matter was involved. The testimony as I understand it is offered to contradict the return of the execution in the replevin suit, and it is incompetent.

(Motion denied—exception.)

20. (Objected to as incompetent for the purpose of contradicting the record of the return of the execution. Objection overruled; exception.)

21. (Objected to as incompetent. Objection overruled; exception.)

764 22. Mr. CATHCART: We offer it in evidence, if the court please.

Mr. PROUTY: I object to the offer, if the court please, as incompetent for the purpose of contradicting the record of the return of the execution.

(Argument.)

The COURT: I think it may be admitted and read in evidence.

(Exception by pl'ff.)

23. Mr. PROUTY: I object to the question as argumentative in

form, and it is immaterial also where the property was situated and how it was situated when the action was commenced, and also on the general ground that it is incompetent to contradict the record of the return of the execution.

(Objection overruled; exception.)

24. Mr. PROUTY: I object to the question as calling for the conclusion of the witness' mind and not for what actually happened within his knowledge, and also as incompetent to contradict the return of the execution.

The COURT: Objection overruled. Of course the witness will be required to speak from his own knowledge.

(Exception by pl'ff.)

25. Mr. PROUTY: I move to strike out the answer of the witness that Mr. Hutchins did not exercise any control over the property during the time mentioned in his answer as stating a conclusion and also as inadmissible for the purpose of contradicting the return on the execution.

(Motion denied; exception by pl'ff.)

765 26. Mr. PROUTY: I object to that, if your Honor please. We didn't offer it in evidence; it is their own exhibit. They offered it in evidence and now undertake to impeach it, undertake to show that it is not true.

(Objection overruled; exception.)

27. Mr. PROUTY: I object to that, if your Honor please. I understand that the witness is undertaking to state the contents of a written instrument.

(Objection overruled; exception.)

28. Mr. ROBERTSON: Objected to as incompetent, irrelevant and immaterial, having no bearing on any issue in this case.

The COURT: Objection sustained.

29. Mr. PROUTY: I object as incompetent for the purpose of contradicting the sheriff's return on the execution.

Mr. CATHCART: Particularly to avoid any question of that I will add to the question:

Q. Before you met Mr. Cooper and Mr. Nahale on the Monday when you served that notice on them?

A. Yes sir.

Q. State what it is.

Mr. PROUTY: Objection on the same ground.

A. Mr. Nahale says—

Mr. CATHCART: Well, I will make it prior to that day.

The COURT: How would it be binding on the plaintiff? It is to be presumed that he performed his duty, and until you attack it, if you can attack it, why it strikes me that it would be improper.

766 I think the objection is well taken.

Mr. CATHCART: Very well, if the court please, then we save an exception, and I would like to make an offer to prove by the witness that the officer on the 21st day of May, 1904, came to him and asked him if he was going to object to the rails being taken up off

any of his lands, stating that he had been sent to get objections from persons to the removal of the rails.

Mr. PROUTY: We object to the offer.

The COURT: The jury will disregard the offer, of course, not being evidence.

Mr. PROUTY: I object to the offer.

The COURT: Well, you have already objected to the question. He just merely puts it in the form of an offer.

Mr. CATHCART: What ruling was there on it?

The COURT: I say I have directed the jury to disregard it. Of course the objection is sustained.

Mr. CATHCART: Exception, if the court please.

Direct examination of J. A. THOMPSON, recalled.

Mr. CATHCART:

Q. Mr. Thompson, have you investigated to see by what authority these papers are now of record in your court, now on file in your circuit?

A. I have.

767 Q. And how do they come to be in your circuit?

A. From the entries made by Mr. Smith in our cost docket it appears that these papers that—the batch I brought in this morning, among those also—

Q. Including these?

A. Were sent up as—on an appeal in that case to the supreme court.

Q. Appeal of—?

A. Of Bierce.

Q. It was the appeal of Bierce, was it not?

A. Bierce, Ltd., intervenor in that case.

Mr. CATHCART: I now offer in evidence, if the court please, the document marked for identification "9".

The COURT: Do you offer 9 and 10?

Mr. CATHCART: Yes, I make the offer of both at the same time to save time.

Mr. PROUTY: Well, we object to them on the ground that they are immaterial and irrelevant and incompetent for any purpose in this case. They relate to a time not only long prior to the judgment in the replevin suit but even long prior to the beginning of the replevin suit, and have no possible bearing on it in any way whatever, and at a time when the firm there, Kinney, Ballou & McClanahan—there has been no testimony about that firm here; we put in nothing about them or what they did. There is nothing in evidence to show that they were the attorneys for William Bierce, Ltd.

The COURT: At that time?

Mr. PROUTY: No.

Mr. CATHCART: We will follow it up to show it, that fact.

The COURT: How do you claim that this has anything to do with this matter?

768 Mr. CATHCART: We want to show by this that the attorneys for the plaintiff, Kinney, Ballou & McClanahan at the time, knew where these rails were, knew the situation of them; that is prior, if the court please, of course, to this suit, this present action, but that they were aware where they were; that they consented to them being there; they consented to the——

The COURT: That is, you proceed on the theory that the knowledge of a person prior to the existence of an agency is knowledge to the principal——

Mr. CATHCART: No, we will show the agency.

The COURT: —after the agency comes into existence?

Mr. CATHCART: We will show the agency at this time.

The COURT: Were they attorneys at that time for Bierce?

Mr. CATHCART: Yes, in this very proceeding.

Mr. WITHINGTON: They were attorneys and had been attorneys before, and were at that time attorneys in fact, and, if the court please, were acting in that very proceeding as attorneys for Bierce.

Mr. PROUTY: They were not attorneys in fact. Bigelow was not a member of the firm at the time that paper was filed.

Mr. WITHINGTON: We will introduce the evidence of W. W. Bierce that they were at this time.

Mr. CATHCART: We will connect that up.

The COURT: It is for the purpose of showing that they had knowledge of the property and situation and the conditions there?

Mr. CATHCART: And conditions there, yes, if the court please.

(Argument.)

The COURT: The objection sustained.

769 Mr. CATHCART: And exception, if the court please. We will have to make an offer or else read all this into evidence.

The COURT: It may be filed as an offer.

Mr. CATHCART: That's all, Mr. Thompson.

(Mr. M. F. Scott recalled.)

Mr. CATHCART: Your witness.

30.

Mr. CATHCART: Well, we object to that as incompetent, irrelevant and immaterial and not cross examination.

The COURT: Objection overruled.

Mr. CATHCART: Save an exception.

31.

Mr. CATHCART: We object to that, if the court please, incompetent, irrelevant and immaterial, carrying it down any further on cross examination. We have never gone that far or anywhere near it.

The COURT: Objection overruled.

Mr. CATHCART: Exception.

32.

Mr. LEWIS: Objection applies, your Honor, to all this line?

The COURT: Yes, this is the same.

Mr. LEWIS: Note an exception.

33.

Mr. CATHCART: I object to it, if the court please, incompetent, irrelevant and immaterial, and also being not proper cross examination and a conclusion of law.

(Objection sustained, exception by pl'ff.)

770

34.

Mr. CATHCART: We object to that, incompetent, irrelevant and immaterial, not proper cross examination.

(Objection overruled.)

Mr. CATHCART: Exception.

35.

Mr. CATHCART: We object to that as being incompetent, irrelevant and immaterial.

36.

Mr. CATHCART: We object to that as incompetent, irrelevant and immaterial.

(Objection overruled; exception by defendants.)

37.

Mr. CATHCART: We object to that as incompetent, irrelevant and immaterial.

(Objection sustained; exception by pl'ff.)

38.

Mr. CATHCART: We object to it, if the court please, incompetent, irrelevant and immaterial.

(Objection overruled; exception by defendants.)

771

39.

Q. Have you seen anybody showing any authority there?

(Objected to as incompetent, irrelevant and immaterial and calling for the conclusion of the witness. Objection overruled; exception by defendants.)

40.

(Objected to as incompetent, irrelevant and immaterial, calling for the conclusion of the witness and not cross examination. Objection overruled, exception by defendants.)

41.

Mr. CATHCART: We object to it as incompetent, irrelevant and immaterial and not cross examination.

(Objection overruled; exception by defendants.)

42.

Mr. PROUTY: I will have to move to strike out witness' answer that

proposition that the trust deed had terminated by its own terms, as not being the best evidence and not responsive to the question.

The COURT: Very well, it may be stricken out.

Mr. CATHCART: We move to strike out all of the answer on the ground it is not responsive to the question.

The COURT: I think the first part of that answer is responsive. It may stand.

Mr. CATHCART: Exception.

43.

Mr. CATHCART: I submit he has answered that question.

(Objection overruled; exception by defendants.)

772 The WITNESS: Well, you will have to repeat the question.

44.

Mr. ROBERTSON: Well, I move to strike that answer out. It is not responsive to the question.

(Answer stricken. Exception by defendants.)

45.

Mr. CATHCART: I object. Absolutely incompetent and immaterial.

(Objection sustained; exception by pl'ff.)

46.

Mr. CATHCART: Same objection, if the court please, incompetent, irrelevant and immaterial.

(Objection sustained; exception by pl'ff.)

47.

Mr. CATHCART: We object to that. What Mr. Paris thought is absolutely immaterial to any issue in this case.

(Objection overruled; exception by defendants.)

48.

Mr. LEWIS: I object to that as incompetent, irrelevant and immaterial, calling for a pure and simple conclusion of law. The bond speaks for itself.

The COURT: Objection overruled.

Mr. LEWIS: We will note an exception.

49.

773 Mr. ROBERTSON: I move to strike out the answer on the ground that it is not responsive to the question.

The COURT: It may be stricken out.

(Exception by defendants.)

50.

Mr. ROBERTSON: Objected to as incompetent, irrelevant and immaterial, not proper redirect.

(Objection overruled, exception by pl'ff.)

51.

Mr. PROUTY: I object to that because it is incompetent to prove notice conveyed by a record by parol evidence.

(Objection sustained; exception by defendants.)

Mr. CATHCART: In connection with the redirect examination of Mr. Scott, at this point, if the court please, I desire to offer in evidence and to read in evidence from the record of the replevin suit, transcript of the record of the replevin suit, in the Supreme Court of the United States, No. 607, on page 94, showing the evidence that was introduced in that case in reference to these rails on the so called Paris land.

(Objected to by pl'ff. Objection overruled.)

Mr. CATHCART (reading):

"Direct examination of M. F. SCOTT, called and sworn.

Mr. McCLANAHAN:

Q. You were at one time receiver of the Kona Sugar Co. were you not, Mr. Scott?

A. Yes sir.

Q. And as such you took possession of the assets and property of the Kona Sugar Co.?

A. Yes.

774 Q. State whether or not the Kona Sugar Co. had any interest in the land over which the Kona Sugar Co.'s railroad ran?

A. Yes, it had an interest in the land.

Q. In all of it?

A. In all of it, excepting one holder, a right there was, as I understand since, a permissive right. At the time I thought it was a written right. *At the time I thought it was a written right*; since that time I have understood it is only a permissive.

Q. The right of a licensee?

A. Yes, yes.

Q. Whose land was it?

A. J. D. Paris.

Q. How much of the railroad ran on the land of the Kona Sugar Co.?

A. Well, there is a total length of about seven miles and a half including the line of track 1 1/2 of which about a little more than six miles was made of the rails of Mr. Bierce. The portion of the rails and portion of the railroad on the Paris land was made wholly of other material, and the distance on Mr. Paris' land is about a little more than a mile, and over that there was only a permissive right.

Q. Now will you please answer my question. You didn't quite understand it. How much of the land belonging to the Kona Sugar Co. did this railroad run over?

A. Well, you mean the land in fee or land in which they had a right, a lease?

Q. Let's take the fee first. We will divide them. How much of fee simple land owned by the Kona Sugar Co. did this railroad run over?

A. Well, there are two tracks which they own a right in fee, and another undivided tract in which they had an undivided interest. The two tracts would aggregate about a third of a mile. The undivided land in which they had an undivided interest would be about a little less than two-thirds of a mile; that was on fee simple land, though.

Q. Now what other interest did the Kona Sugar Co. have in land over which this railroad ran?

A. Leasehold interest.

Q. Whose leasehold; who was the lessor?

A. Well, beginning at the mill the first lessor was the Kapiolani Estate.

Q. How much of the track ran over that piece of land?

A. They have two tracts, two tracts of land. The first one the mill stands on and the track starts from the boundary, that is, it runs across the entire width of it, and also includes all the side-tracks surrounding the mill, and that tract there is—I can only give you these distances approximately—I suppose it is about 400 feet across the tract. Then there is a switch running the entire distance across it, and then there is a spur track of about 500 feet.

Q. 500?

A. 500 feet. Then that is not the extreme north end of the road; there is a little—another tract still north of that, over whom they obtained a right of way from Kunuiakea.

Q. Have you given me all of the track on the Kapiolani Estate land?

A. On the first tract I have.

Q. That is about 1300 feet?

A. I better begin at the end of the road and proceed along; it will be a more intelligent way of giving this evidence. Track began there first, the extreme north end of the road begins on land owned by the Catholic Mission, sub-let to a native, or leased to a native; the native sub-leased to two Japanese and the Japanese granted a right of way to the Kona Sugar Co. over the land.

Q. In writing?

A. In writing.

Q. When was that grant made?

A. That grant was made in September, 1901, in August, September, October, along there sometime.

Q. Before or after the rail was laid?

A. Before the rail was laid, but not before the rail was commenced. The railroad, the construction of the railroad was blocked for several months in order to get the right of way, and they—they have had to pay \$500 to secure that right of way.

Q. In 1901?

A. Yes.

Q. How much of the road ran on that right of way; how long was their piece on that right of way?

A. Between four and five hundred feet of track.

Q. How long was the right of way, or license, how long did it extend?

Q. During the residue of their right.

Q. During the residue of whose right?

A. These Japanese's right, which I believe is six or seven years.

Q. Now what is the next piece?

A. The next piece is the Kapiolani Tract which I have just stated.

Q. Yes.

A. The next.

777 Q. That is 1300 feet?

A. Including all the spurs and side-tracks.

Q. How long was that leased for?

A. I think about thirty years.

Q. Thirty years?

A. I think there is an extension of the lease clause in the lease that extends it approximately thirty years.

Q. Now what is the next piece?

A. The next is Wilberoth, Henry Wilberoth's land, and the distance across that is perhaps 600 feet.

Q. 600 feet?

A. Might be a little less, 500 feet.

Q. How did they get the right to pass over that land?

A. By a written right.

Q. Right of way?

A. Yes.

Q. When was that obtained?

A. In 1901.

Q. Before or after the road was made?

A. Before.

Q. Before the road. How long does that right, that license, extend?

A. 30 or 50 years, I have forgotten which.

Q. What is the next piece of land?

A. The next piece of land is Sophia Coburn, Sophie—Mrs. Sophie Coburn.

Q. How long is the track over that land?

A. That is four or five hundred feet.

Q. And how do they have the right there?

A. By a written lease.

Q. Lease or right of way, license?

778 A. License, right of way.

Q. Right of way?

A. Yes.

Q. How long is that for?

A. I am not sure whether it is 30 or 50 years. It is a long time.

Q. I see, and was that obtained before or after the railroad was constructed?

A. Before.

Q. What is the next piece?

A. The next piece is the—is a Kapiolani Tract. Now wait until I see. Yes, Kapiolani Tract.

Q. How long is the track over that land?

A. 300 feet perhaps.

Q. How does that right obtain; what is it, a license or leasehold?

A. It is a leasehold.

Q. How long is the lease?

A. It has an extension clause for 30 years.

Q. What is the next piece?

A. The next piece is—I forget the name of the piece. It is one of the pieces that the Kona Sugar Co. had in fee.

Q. One that they had in fee?

A. Yes.

Q. Undivided interest?

A. No, in fee, in full possession.

Q. Third of a mile run over that?

A. Approximately.

Q. Now what was the next piece?

A. Puapuanui, belonging to the Greenwell estate.

Q. How much track ran over that?

779 A. Six or seven hundred feet—No, it is more than that. It is perhaps seven or eight hundred feet.

Q. How did they have a right to go over that land?

A. By a right of way or lease of the right of way.

Q. Is this a lease or right of way, a license or right of way—or lease?

A. It is a right of way. They have the—they have a lease of a portion of the tract.

Q. Puapuaiki, don't they lease that?

A. A part of Puapuanui, but I believe that that land which they have leased does not extend quite down to the railroad; I think it only extends to the road and the railroad just near the boundary of that land crosses the road and runs below the road, and it is a right of way.

Q. How long does that right of way, that license, extend?

A. I think it is fifty years. Most of these rights of way were fifty?

Q. Was this obtained before or after the construction of the road?

A. Before.

Q. What is the next piece of land?

A. The next piece of land is Holualoa 1 and 2, in which the company owned an undivided interest.

Q. How long is the road over that land?

A. Well, within that land there are two other grants; within these lands were two other grants, and the trackage on the Holualoa 1 and 2 proper I think is between a half and two thirds of a mile.

Q. How long is the track over those two grants that are within Holualoa?

A. Over the first one which is known as—the name has slipped me—it is perhaps between three and four hundred feet across it.

Q. What is the interest of the Kona Sugar Co. in that?

- A. They have a right of way across it.
Q. A written right of way?
A. A written right of way.
Q. Was it obtained before or after the construction of the road?
A. Before the construction of the road.
Q. Now that piece within there, how long is the road over that?
A. That is between four and five hundred feet.
Q. And how do they have an interest there?
A. A right of way across it.
Q. A written right of way?
A. Yes.
Q. How long does it extend for?
A. Fifty years, I think.
Q. Was it made before or after the construction?
A. It was obtained before.
Q. What is the next piece of property?
A. The next is known as Holualoa 3.
Q. And what is the distance across that?
A. The distance across that is between five and six hundred.
I should say it is five or six hundred feet.
Q. And how do they have an interest in that land?
A. A right of way across it.
Q. In writing?
A. Yes.
Q. Obtained before or after the construction of the road?
A. Before.
781 Q. What is the next piece?
A. The next piece is Holualoa 4, which the Kona Sugar Co. own in fee.
Q. What is the distance across that?
A. Distance across that is perhaps between 800 and a thousand feet.
Q. What is the next right of way?
A. The next is Pahoehoe, of which there are 1, 2, 3 and 4.
Q. What is the distance across that land?
A. The distance across the four lands is something like between six and eight hundred feet.
Q. What is the interest of the Kona Sugar Co. in that land?
A. One of them was a leasehold interest; the others are rights of way, that is—
Q. And obtained before the construction of the road?
A. Obtained before the construction of the road.
Q. And when does the lease expire?
A. I am not sure what is the length of the lease; it was a pretty long lease, though.
Q. What is the next land?
A. The next lands were the lands formerly of the Hawaiian Coffee & Tea Co. afterward the Kailua Coffee Co. and at this time belong to Vasconcello and M. V. Sousa, under mortgage to the Lunalilo estate of which W. O. Smith was trustee and his associates. Their right of way is, or their license there is a right of way

across that for fifty years, in which the owners of the land at that time joined, and also the mortgagors—mortgagees—joined in the right of way across.

Q. Was that obtained before or after the construction?

782 A. Obtained before.

Q. What is the next item?

A. Wait a minute please. There are so many of these lands perhaps I may get them a little confused. Between Pahoehoe's and this land that I have last described was Kamalomalo, of which the Greenwell Estate were the owners in fee, and there were some tenants and the right of way was signed by all of the parties, the owners of the fee and the tenants.

Q. Before the construction of the road?

A. Before the construction of the road.

Q. And what is the distance across these lands?

A. Well, up to a thousand feet, I should think.

Q. Any other lands?

A. Well, the next, the land I have described, is this Hawaiian Coffee and Tea Lands. Then comes—there are also along within these lands a few kuleanas that are crossed for which rights of way were obtained, that I may have omitted. The next land after these is Keauhou 1 and 2.

Q. What is the distance across those?

A. The distance across that is between a mile and a half and two miles.

Q. What is the interest of the Kona Suga Co. in that land?

A. A right of way across it.

Q. In writing?

A. Yes.

Q. Obtained before or after the construction of the road?

A. Obtained before.

Q. What other lands are there?

A. The next land, I am not sure whether it is Honalo or not; I think it is. The land is owned, I think, by Isaac Sherwood in fee. There are some tenants on the land from whom a right of way were obtained. I wouldn't be sure whether the owner, Sherwood, joined in the granting of the right or not. I couldn't say for sure, positive, about that.

783 Q. What is the distance across?

A. Four or five hundred feet.

Q. What is the next?

A. Well, I think that at that point the Paris and the Paris interests' lands begin,—that is the Paris land, Mrs. Roy's land, Mrs. Robertson's land, and Shipman's, I think, further on to the end of the track.

Q. Now is that the land which is farthest from the mill?

A. Yes.

Q. The Paris land and the Paris interests?

A. Yes.

Q. Where did you get your knowledge of these right of ways coming from—obtained?

A. From the written instruments in my possession at that time.

Q. They were in your possession?

A. Yes.

"Cross-examination of M. F. SCOTT.

Mr. CATHCART:

Q. At what distance from the mill does the Paris land commence,—that is the Roy land, the lands represented by the Paris interests?

A. Well, it is more than six miles, it is more than six miles to the mill.

Q. Are any of those—of the rails that are laid on this Paris interest lands rails that were sold by Bierce to the Kona Sugar Co.?

A. No.

784 Q. They are different rails entirely?

A. Different rails entirely.

Mr. McCLANAHAN: We now ask the court, and with the consent of counsel, that the papers introduced in the McChesney suit be taken as read in evidence without going through them."

I offer in evidence, if the court please, the reporter's transcript of the evidence in the replevin case, made by the official stenographer, certified by him, if the court please, and filed in the supreme court of the Territory April 16th, 1904, showing the same testimony that I have read, if the court please. I offer in evidence particularly that part of it covered by Mr. Scott's testimony which I just read.

Mr. PROUTY: I object to it on the ground that it is not an original document in the litigation. It is a copy; it is secondary evidence and no foundation has been laid for it by showing that the witness so testified.

The COURT: The objection sustained as to the offer.

Mr. PROUTY: Now if your Honor please I move to strike out and exclude the matter which Mr. Cathcart has just read to the court and jury purporting to be a portion of the testimony of Mr. M. F. Scott as taken in the replevin suit, on the ground that no proper foundation has been laid for reading from the paper that he read from.

Mr. CATHCART:

Q. I will ask you then, Mr. Scott, you have heard what I have just read to the jury as your testimony given in the replevin suit when you were called on the stand as a witness for the plaintiff, have you not?

A. I have.

Mr. CATHCART: If the court has any doubts and wants to
785 rule now on the motion I will offer to show by the witness, Mr. Scott, that he did testify as I have read, if the court please, at that time.

Mr. ROBERTSON: We object to that offer, if the court please. Our motion is to strike out the entire matter that Mr. Cathcart has just read from the book, whatever it is, on the ground stated. It is not

supported by any oath; it is irrelevant, immaterial, a mere conclusion of the witness not the best evidence.

(Motion to strike granted except as to portions relating to Paris lands. Exception by defendants and plaintiff.)

Mr. CATHCART:

Q. Mr. Scott, have you heard me read the testimony that you gave in the replevin suit, purported to give in the replevin suit, relative to the Paris lands and the rails of the Bierce Company on the Paris lands and the Paris interest lands?

Mr. PROUTY: I object to that question on the same ground stated in our motion to strike out.

Mr. CATHCART:

Q. I will ask you if that testimony is true, if you gave it as I read it there?

(Objected to on the ground that no proper foundation has been laid.) Objection overruled; exception.)

Q. Answer the question, Mr. Scott, as to whether that testimony is true or not.

The COURT: You have reference to the latter part there? The first portion is stricken out.

Mr. CATHCART: Where the rails are on the Paris land.

(Objection renewed, overruled, exception.)

A. I would like to look at it, if I can, again.

Q. Look at the testimony.

786 A. Can I look at it again?

The COURT: The latter part.

A. All the testimony you have read of mine regarding the Paris lands and the Bierce rails there mentioned, the Bierce rails whether on the Paris lands or not, is true.

Mr. CATHCART:

Q. And it was given at that trial as I read it?

A. It was given at that trial.

Mr. PROUTY: I wish to strike out the answer on the ground it is not responsive to the question.

(Motion to strike denied; exception.)

52.

Mr. CATHCART:

Q. I will ask you then whether Mr. William Bierce was present when you gave that testimony?

Mr. PROUTY: I object to that testimony as entirely immaterial.

The COURT: Objection sustained.

Mr. LEWIS: We note an exception.

Mr. PROUTY: I object to it as incompetent to show the authority of the receiver in that way.

Mr. CATHCART: I am going to follow it up, if the court please. I will follow this up, showing how the advisory committee came to have control of the receiver there by order of the court, and also how the order of the court was competent.

Mr. PROUTY: I also object. It relates to a period long
787 prior not only to the judgment but even to the bringing of the replevin suit, and it is incompetent.

The COURT: Objection sustained.

Mr. CATHCART: Exception. Now at this point, if the court please, I wish to make an offer, so that our rights will be absolutely protected in this matter. I wish to show by this witness, if the court please, that at the time he was acting as receiver there and did the acts of which he has spoken in reference to the rails and the locomotive, that he was acting as receiver under orders of the court and under the direction of an advisory committee which was appointed by the creditors of the Kona Sugar Co., including William W. Bierce, Ltd., the plaintiff in this action.

Mr. PROUTY: I object to the offer, if your Honor pleases, on the same grounds stated in the objection to the last preceding question. (Argument.)

Mr. CATHCART: I propose, by the questions which I have asked the witness, to lay the foundation for the introduction of the creditors' agreement in writing and the order of court made thereon.

The COURT: That creditors' agreement that you refer to is signed by William W. Bierce?

Mr. CATHCART: Yes, if the court please, it certainly is.

The COURT: This is the instrument that the supposed consent is given in?

Mr. CATHCART: Yes, your Honor.

The COURT: The instrument upon which the order of the court was based?

Mr. CATHCART: Yes, your Honor.

(Argument.)

788 The COURT: Well, I will permit this to be read in evidence. I refer to what is marked here as Exhibit "A."

(Exception by plaintiff.)

Mr. CATHCART: "In the case of M. W. McChesney and others against the Kona Sugar Co., Ltd., filed in the circuit court, third circuit"—As a preliminary, if the court please, I will ask Mr. Scott if he, showing him the document marked for the defendant as No. 9 for identification, and ask him whether or not he presented—he has already identified it,—ask him whether or not he himself presented that document to the court.

Mr. PROUTY: What are you showing him now?

Mr. CATHCART: I am showing him now the petition and asking him if he presented that to the court.

The COURT: I haven't ruled on that yet; I only ruled on the admissibility of the supposed or so-called agreement.

Mr. CATHCART:

Q. Did you present it?

A. I did.

Q. That petition refers to and to it is attached Exhibit "A," the document marked as Exhibit "A"?

A. Yes.

Mr. CATHCART: I will at this time offer in evidence the document known as Exhibit "A," if the court please.

Mr. PROUTY: I object to it. The execution of the instrument is not proven.

Mr. CATHCART: Well, then, if the court please, I withdraw the offer of the Exhibit "A" and offer the petition, including Exhibit "A," as under the testimony already in of Mr. Thompson, which shows that it is a part of the records of this court, and upon
789 the testimony of Mr. Scott that he presented this to the court.

Q. Do you know whether this is a copy or not, Mr. Scott, or whether this is the original, and if so, do you know where the original is, if this is a copy?

Mr. ROBERTSON: We submit that the petition is the best evidence of what that purports to be.

54.

Mr. PROUTY: You better produce it.

Mr. CATHCART: We submit, if the court please, that it is a record of the court, filed in this action, and, copy or not, it is referred to in the petition, and it imports absolute verity until it is impeached.

The COURT: Objection sustained.

Mr. CATHCART: We ask an exception.

55.

Mr. PROUTY: I object to the question, incompetent, irrelevant and immaterial; leading.

The COURT: Objection sustained.

Mr. CATHCART: Exception.

56.

Mr. ROBERTSON: We move to strike out the testimony given this morning by this witness to the effect that Linder had no authority from Hutchins, on the ground that it now appears to be hearsay, therefore not admissible.

The COURT: It is not evidence. The motion to strike will be granted.

Mr. ROBERTSON: Will your Honor instruct the jury to disregard the portion of the witness' testimony in that regard given
790 this morning.

The COURT: So ordered. The jury will disregard it.

Mr. CATHCART: We will except, if the court please.

Direct examination of ALBERT WATERHOUSE, recalled.

Mr. LEWIS:

Q. In connection with the document which has been heretofore introduced in evidence, known as the creditors' claim of Bierce & Co. of September 30th, 1904, known as Plaintiff's Exhibit "EE," I hand you a letter and ask you if you have ever seen that letter before?

A. Yes.

Q. Do you know under what circumstances you received it?

A. This letter came——

Mr. PROUTY: Answer yes or no.

The COURT: Do you recall the circumstances under which you received it?

A. Yes.

Q. You do?

A. Yes.

Mr. LEWIS:

Q. Relate then, if you will.

A. This letter came in my hands together with that claim of September 30th, at the same time, received them both the same time.

Q. Well, what was the nature of the container, if any—
791 thing, or how were they received?

A. Came together in the same envelope.

Mr. LEWIS: I would ask that this letter which the witness has just identified be offered. I offer it in evidence and ask that it——

The COURT: You haven't proved the signature yet, have you, Mr. Lewis?

Mr. LEWIS:

Q. Is that——?

A. That is the signature that was on it when the letter came, Kinney, McClanahan & Cooper.

Mr. PROUTY: We have no objection to the letter.

The COURT: Very well, no objection, it will be received in evidence.

Mr. LEWIS: And marked defendant's Exhibit "10."

(Letter read to the jury.)

Q. Mr. Waterhouse, I direct your attention to an exhibit marked plaintiff's Exhibit "CC," particularly to the second page thereof, and to an ink mark and cross on that page, and will ask you whether or not that ink mark and cross on that page as follows, being an ink mark over the word 1904, the word "three" written in ink, and also a check on the side thereof, were on that document when you received the same, on or about September 6th, 1904?

A. The change was not made when I received it; no ink mark.

Mr. PROUTY:

Q. Was the change made at any time while it was in your possession?

A. No sir.

Q. When you delivered the document or sent the document back to Kinney, Ballou & McClanahan who sent it to you, or Kinney, McClanahan & Cooper who sent it to you, did you make any change in it?

A. No sir.

Q. As to this date which I have directed your attention to, how did it read when the document was in your possession?

A. 1904.

Direct examination of J. A. THOMPSON, recalled.

Mr. LEWIS:

Q. You have been sworn I believe before in this action and testified as to being the custodian of the records of the supreme court?

A. Yes sir.

Q. I direct your attention to a portion of the record in the supreme court in the case of W. W. Bierce, Ltd., a corporation, plaintiff, versus Clinton J. Hutchins, Trustee, and particularly to the opinion of the supreme court, and ask you if that is part of the records of that case?

Mr. ROBERTSON: Objected to as incompetent, irrelevant and immaterial, if the court please. We offered the opinion of the Supreme Court of the United States and on counsel's objection it was excluded.

Mr. LEWIS: I will state the reasons why I desire to have this in evidence. Counsel objects to the whole opinion going in. I have no desire to put the whole opinion in; I simply now desire to put the first and last pages of the opinion in, to have of record the date of the decision of the supreme court as being January 28th, 1905, and showing the action which was taken on that day by the supreme court. The part of this opinion showing it was decided December 28th, 1905; also on that date that the court handed down its opinion.

Mr. PROUTY: We will admit that the supreme court of the Territory handed down its opinion in the case on that date.

The COURT: I am not holding the opinion is evidence; merely the date they rendered the opinion and the conclusion. Proceed, Mr. Lewis, give us the date on which the opinion was rendered.

Mr. LEWIS (reading): "William W. Bierce, Ltd., versus C. J. Hutchins, Trustee. Exceptions from circuit court, first circuit. Argued November 14th, 1904. Decided January 28th, 1905."

The COURT: Now stop there. Now what was the conclusion reached?

Mr. PROUTY: Exception.

Mr. LEWIS (reading): "The exceptions so far as they raised the question of election are sustained. The judgment of the trial court is reversed, and the cause is remanded to that court for such further proceedings as may be proper." And then I also desire to remark that this decision was filed January 28th, 1905, Geo. Lucas, Clerk.

Mr. ROBERTSON: We move to strike out what Mr. Lewis has read here, all except the date of the opinion, on the ground that it is in-

competent, irrelevant and immaterial and has no bearing on
794 any issue in this case.

The COURT: The motion to strike will be denied.

Mr. ROBERTSON: Exception.

Mr. LEWIS: That's all, Mr. Thompson.

Mr. PROUTY:

Q. Mr. Thompson, referring to the paper from which Mr. Lewis has just read certain excerpts, how many pages are there in that paper of typewritten matter?

A. 11 pages in all; not all of them full pages.

Q. How many of them are full pages?

A. Well, by folio or——?

Q. Well, you say they are not all full pages. I ask you how many of the pages are full pages?

A. That is, typewritten matter?

Q. Yes.

A. About nine.

Q. Is that the first opinion of the supreme court of the Territory filed in the case in which it is entitled?

A. In that case?

Q. Yes.

A. I will have to look through the record. In looking through the files here I see it is the first in this case.

Q. Yes. By whom was it prepared?

A. I don't know. You mean typed, or the opinion written?

Q. No, no, who wrote the opinion?

A. Chief Justice Frear.

Q. Do you know whether he prepared the syllabus, two pages preceding the opinion and attached to it, containing one of extracts which Mr. Lewis has read and the syllabus of the case?

A. I do not.

795 Q. Well, do you know whether it was all filed together? Were not those pages—Was it all filed in the Clerk's office together?

A. From all appearance they were filed at the same time, all tacked together as it is, one file, as one document.

Q. That is, when you say the document was filed January 28th, 1905, you mean that those two pages then constituted a part of it, do you not?

A. Yes sir.

Q. And the last paragraph which Mr. Lewis read is the last, the concluding paragraph of the opinion immediately preceding the signatures of the Justices, is it not?

A. Yes sir.

Mr. PROUTY: That is all.

Mr. CATHCART: Call Mr. Conant.

Mr. PROUTY: May it please the court, we move to strike out the testimony of the witness so far as it purports to state what conversa-

tion occurred at the time and place mentioned by him and between Mr. Scott and Mr. Cooper, and also his testimony in relation to the giving of the notice by Mr. Scott to Mr. Nahale and Mr. Cooper, on the ground that it is incompetent to contradict the record of the sheriff's return on the seizure by parol testimony.

(Motion to strike denied; exception by pl'ff.)

796

58.

Mr. ROBERTSON: Objected to as incompetent, irrelevant and immaterial, having no bearing on any issue in this case.

The COURT: Objection sustained.

Mr. CATHCART: We make an offer of this in evidence, if the court please, a memorandum taken at the time of the refusal of Judge Cooper.

Mr. ROBERTSON: We object to it as incompetent, irrelevant and immaterial.

797 Direct examination of J. L. HORNER, called and sworn:

(Withdrawn.)

Direct examination of J. A. THOMPSON, recalled:

Mr. LEWIS: I don't know that I will need Mr. Thompson unless counsel raises some objection. At this time I desire to offer in evidence those portions of the original complaint in the replevin action which your Honor ruled out in plaintiff's case in chief on the ground that they were not introducing the original complaint: that they were introducing an amended complaint.

The COURT: You wish now to read that portion that was stricken out?

Mr. LEWIS: Yes, as showing the original complaint in the replevin action as it stood before amended.

The COURT: You simply wish to read that portion which was stricken out?

Mr. LEWIS: Yes, your Honor.

Mr. PRUTY: I object to it as incompetent, irrelevant and immaterial in this case. The Supreme Court has decided that these amendments were properly made, your Honor.

The COURT: I will permit that portion of it stricken out to be read in evidence.

(Exception by pl'ff.)

798

Mr. LEWIS: And I desire to read in evidence that portion of the original complaint in the replevin action as it stood prior to the amendments.

The COURT: Better give the page.

Mr. LEWIS: Page and number, and I will probably have to read two lines in order to show as it was before it was amended.

On the third page of the complaint, the fifth article of the complaint and first two lines of said complaint were as follows: "That thereafter, to wit, on or about March 13th, 1901, a supplementary contract in writing was entered into between the" said William W.

Bierce, Ltd., and said Kona Sugar Co. Ltd.—Those were the first three lines as they stood.

The amendment of March 7th, 1903 struck out—or by order of the court the three lines were amended as follows: Beginning with the first line of article 5 and continuing on the second line of article 5, the following words were stricken out: “a supplementary contract in writing was.”

On the fourth page of the original complaint, sixth article of said complaint, the first two lines read as follows before amendment: “That thereafter, in accordance with the terms of said supplementary contract, but not otherwise, the said William W. Bierce, Ltd.” On the second line of said article sixth, page 4, the word “supplementary” was stricken out by order of the court.

On page 5, article 7, line one of said article 7 before amendment read as follows: “That from the date of said supplementary contract and up to.” By order of the court, March 7th, the word “supplementary” was stricken out.

I now refer particularly to article 14 on page 7. Before amendment this article read as follows: “That the actual value of said property is \$15,000” (in letters, repeated in numerals and dollar sign, \$15,000). By amendment the words fifteen thousand dollars, in letters, and \$15,000 in figures, were stricken out. By amendment allowed March 7th, 1904, there was inserted in lieu of the words and letters fifteen thousand dollars, which *was* stricken out, the words “twenty thousand dollars,” and thereafter by an amendment on March 19th 1904 the said paragraph was amended by substituting for twenty—by adding to the word “twenty” the word “two” and adding also the dollar sign and numerals \$22,000.”

That to the exhibit denominated and designated “A,” attached to said complaint, on the second page of said exhibit, in the officer’s name signing as president for the Kona Sugar Co., there appeared before amendment the initials F. W. before the name McChesney. Above the same are then written J. M. and on the side there was also written “by its treasurer, F. W. McChesney.”

(Here the court takes an adjournment until next Monday Morning.)

800 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

W. W. BIERCE, LTD.,

VS.

WILLIAM WATERHOUSE ET AL.

MAY 18, 1908.

Direct examination of R. W. SHINGLE, called and sworn.

Mr. CATHCART:

Q. What is your business, Mr. Shingle?

A. What is that, Mr. Cathcart?

Q. What is your business?

A. I am president of the Waterhouse Trust Co.

Q. In Honolulu?

A. Yes sir.

Q. And were you such president in the year 1904, do you remember, or what office did you hold then in the company?

A. I think it was in the—I think it was in the beginning of 1900—that is, 1903, that the firm—the firm of Henry Waterhouse and Arthur Wood incorporated as the Trust company. At 801 that time I was secretary.

Q. And you have been connected with them either as secretary or president ever since it was organized?

A. Yes sir.

Q. You know Mr. C. J. Hutchins, do you?

A. Yes sir.

Q. And have known him for the same period of time, have you not?

A. Yes sir.

Q. You know the properties situated in Kona on the Island of Hawaii that were known as the Kona Sugar Co. properties plantation?

A. Yes sir.

Q. Are you acquainted with a man by the name of Linder?

A. A. F. Linder, yes sir.

Q. Do you remember any instructions, any request from—

Mr. PROUTY: I object to that as suggestive.

The COURT: Let's hear the question, find out what it is.

Mr. CATHCART:

Q. Do you remember any attempted negotiations that he had with C. J. Hutchins in respect to the railway on the Kona Sugar Co. plantation, and the equipment?

Mr. PROUTY: I object to the question, if your Honor please; leading and it calls for a conclusion, and hearsay.

(Objection overruled; exception by pl'ff.)

A. Yes sir.

Mr. CATHCART:

Q. Will you state what you know of that transaction and when it was; who were present; what was said?

Mr. ROBERTSON: Objected to as irrelevant and immaterial, 802 incompetent and hearsay.

Mr. CATHCART: This is the idea. It has already appeared in evidence that this man Linder used part of the railway, during the month of June, 1904, for the transportation of certain sugar to the mill. Now we want to show, if the court please, that it was not done by the authority, direct or indirect, of the defendant C. J. Hutchins.

The COURT: Objection sustained.

Mr. CATHCART:

Q. You are acquainted with M. F. Scott, are you, Mr. Shingle?

A. How is that?

Q. You are acquainted with M. F. Scott?

A. Yes sir.

Q. And you have known him for several years past and before the year 1904?

A. Yes sir.

Q. Do you know what his connection was relative to the properties which I have mentioned?

A. You mean at the time under our trust?

Q. Yes.

A. He was the beneficiary.

The COURT: You are not asked—the question does not call for what it is, but you can answer yes or no. The question is, do you know what his connections were?

A. Yes.

Mr. CATHCART:

Q. And during the year- 1903 and '4, do you know what his connection with the properties was?

Mr. ROBERTSON: We object to it on the ground that — is a mere conclusion of the witness, not a statement of fact.

Mr. CATHCART: Merely to show that Mr. Scott's actions were wholly authorized and that he had power to do what he did do. We want to show that Mr. Scott was there on the ground with Mr. Shingle, acted with him and as agent of Hutchins on the ground there, and probably we can follow it up by showing that it was known among the people there that Scott was acting on the ground for him.

(Objection overruled; exception by pl'ff.)

Q. Will you answer the question?

A. I knew Mr. Scott to be a beneficiary under the trust, C. J. Hutchins trust, and also——

Mr. PROUTY: I move to strike out that statement.

The COURT: Let's have the answer first.

A. And also Mr. Hutchins' agent on the ground in Kona.

Mr. CATHCART:

Q. And how did you know that?

Mr. PROUTY: I move to strike that answer out as stating a conclusion.

Mr. CATHCART:

Q. How did you know he was a beneficiary and an agent?

A. I knew that he — the beneficiary under this trust which Henry Waterhouse & Co. held because Mr. Hutchins so informed me who were interested with him in the purchase of that property, and I also

knew that he was Mr. Hutchins' agent on the ground because,—in our dealings with Mr. Hutchins and Mr. Scott through our own representative Mr. Conant, who was our manager there at the plantation; in other words we consulted with Mr. Scott on the ground in regard to matters in which Hutchins was interested in.

Mr. PROUTY: Move to strike out the answer as entirely hearsay and incompetent.

(Motion denied; exception by pl'ff.)

804 Direct examination of J. L. HORNER, recalled.

Mr. CATHCART:

Q. Mr. Horner, what was your occupation during the month of March 1904?

A. Official stenographer in the circuit court.

Q. And in the department presided over by the Honorable J. T. De Bolt?

A. Yes sir.

Q. Were you the official stenographer who reported the trial of W. W. Bierce, Ltd., versus Clinton J. Hutchins, Trustee, an action for replevin of the material and the case in which this bond was given? You can look at this if you want to. (Showing transcript.)

A. I was.

Q. I call your attention to this document which I hold in my hand and ask you if that is the original transcript of the evidence in that case?

A. It is.

Q. I call your attention to page 22 thereof and ask you to say whether or not W. W. Bierce was a witness on that trial and ask you to state for whom he was a witness.

(Objected to. Question withdrawn.)

Q. Do you know whether W. W. Bierce was a witness on that trial?

A. I know Mr. Bierce was a witness. I don't remember his initials.

805 Q. I would ask you if you can refresh your memory as to his initials by looking at the transcript of the evidence.

Mr. ROBERTSON: Admitted that it was William W. Bierce.

Mr. CATHCART:

Q. And can you say by which party to the action he was called as a witness?

A. I cannot independently.

Mr. PROUTY: We will admit he was not here in behalf of the defendant.

Mr. CATHCART: Will you admit that he was here in behalf of the plaintiff and sworn in behalf of the plaintiff?

Mr. PROUTY: Yes.

Mr. CATHCART:

Q. Now will you state whether or not this is a true and correct transcript of the evidence that was taken in that case?

A. It is a true and correct extension of my shorthand notes of the evidence.

Q. And was the testimony that was given, the evidence that was given in that case correctly reported by you and taken down in your shorthand notes?

A. To the best of my ability, yes.

Q. Have you any recollection of what Mr. Bierce testified to in that action relative to his attorneys in Honolulu being—his attorneys at law in Honolulu being also his attorneys in fact?

A. I have not.

Q. I call your attention to page 39 of the transcript of evidence and ask you if you can refresh your memory from that?

806 Mr. PROUTY: I object to that, if your Honor please, on the ground that it is not shown that the paper shown the witness was made by him.

Mr. CATHCART:

Q. By whom was this transcript of evidence made up?

A. By myself.

Mr. PROUTY: I object to that. By whom the transcript was written.

Mr. CATHCART: Well, I know; then typewritten, to save all question.

A. By myself.

Q. And from what?

A. My shorthand notes taken at the trial.

Q. From the notes made by yourself as official reporter and stenographer?

A. Yes sir.

Q. Now I again call your attention to page 39 of this transcript and ask you if your memory can be refreshed from that transcript as to what Mr. Bierce said while a witness on behalf of the plaintiff?

A. My memory can be refreshed.

Q. Will you kindly state what Mr. Bierce said as to such attorneys in fact and how long they had been attorneys in fact and who they were.

A. He said Kinney & McClanahan had been attorneys in fact as well as attorneys at law for the Bierce Co. ever since Mr. Gilbert's trip to the islands in 1901.

Q. What did he say as to being the attorneys in fact of the plaintiff at the time that action was tried?

A. May I refresh my memory? He said that Kinney & McClanahan were his attorneys at that time.

Q. Attorneys in fact as well as attorneys at law?

807 A. That is my recollection. He said they were attorneys in fact.

Mr. ROBERTSON: At the time of the trial of the replevin case, is that it?

Mr. CATHCART: At the time of the trial of the replevin case.

Q. Can you state whether or not Mr. E. B. McClanahan was a witness in that cause, and if so for whom was he a witness?

A. I believe he was.

Q. Can you state now whether he was or not?

A. He was.

Q. And can you state whether or not he was—for whom he was a witness for the plaintiff or for the defendant.

(Admitted by Mr. Prouty that he was for the plaintiff.)

Q. Was that E. B. McClanahan a member of the law firm of which Kinney was the senior and—the juniors varied so often that it is hard to tell who was there at that time?

Mr. PROUTY: I object to that question, if your Honor please, as too vague and indefinite.

Mr. CATHCART: It has been known as Kinney's law firm anyway.

Mr. ROBERTSON: Kinney & Co.

A. He was.

Q. Can you state whether the witness at that time stated that the plaintiff, with the officers, bondholders, stockholders and creditors of the Kona Sugar Co. formed a committee, called the bondholders' committee, and if so state what was the purpose of the committee, who composed it, and whether or not the receiver, the agent of the receiver of the Kona Sugar Co. operated and worked under that committee?

Mr. ROBERTSON: We object to that on the ground it is incompetent, irrelevant and immaterial, having no bearing on any
808 issue in this case.

Mr. CATHCART: We want to show, if the court please, that the rails were laid there by the receiver with the knowledge of the plaintiff, knowledge and approval of the plaintiff.

The COURT: Objection sustained.

Mr. CATHCART: To save any rights we have got we desire to make the offer to show by the witness, Mr. Horner, that Mr. Clana-han testified in the former suit, and by way of an admission, we want to show by way of admission, that the receiver, Mr. Scott, while operating the road down there was running the plantation and acting under the direction of a committee of creditors which was appointed under an agreement entered into by the plaintiff in this action.

The COURT: The court doesn't understand that that position is attacked by the plaintiff.

Mr. PROUTY: Well, we do not attack it, except to this extent that we regard it as wholly immaterial.

(Recess.)

Mr. CATHCART: At this time defendant, referring to plaintiff's Exhibit "LL," asks the plaintiff to produce the option, or a copy

thereof, and all papers relating thereto, which is referred to in that exhibit as follows: "This option is subject to the one previously given to the Kapiolani Estate, Ltd.," etc. The original option to the Kapiolani Estate, Ltd., or a copy thereof, and all papers relating thereto, that exhibit being dated April 24th 1904.

809 Cross-examination of J. L. HORNER.

Mr. ROBERTSON:

Q. Will you state, Mr. Horner, whether Mr. Clinton J. Hutchins was present at the trial of the replevin action when Mr. Bierce and Mr. McClanahan testified?

Mr. CATHCART: I object to that as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

A. I can't say from memory.

Mr. ROBERTSON:

Q. Can you refresh your memory in any way?

A. If he was a witness I can tell by the transcript.

Q. Well, can you state whether or not he was a witness in that case?

A. I don't remember.

Q. Will you please refresh your memory from the transcript.

A. He was not a witness.

Q. Does your transcript show if Mr. Hutchins was there or not?

A. Not unless he was called as a witness or identified.

Q. You haven't any recollection on the point aside from the transcript?

A. I have not.

Mr. ROBERTSON: That's all.

Mr. WITHINGTON: We desire to call Mr. Cathcart on one point that I overlooked in his direct examination.

810 Direct examination of J. W. CATHCART, recalled.

Mr. WITHINGTON:

Q. Mr. Cathcart, I wish to know whether you were present at any time when Mr. Scott and Mr. Hutchins were present when the subject of redelivery of this railroad material was discussed?

Mr. ROBERTSON: Objected to as incompetent, irrelevant and immaterial and hearsay.

(Objection overruled.)

A. Yes, I was present; two or three interviews relative to the delivery of the property.

Mr. WITHINGTON:

Q. When were these with reference to the time when Mr. Cooper visited Kona?

(Same objection, same grounds; objection overruled; exception.)

A. It was—the conversations were prior to the 23rd day of—prior to the 21st day of May 1904.

Q. How long prior?

(Same objection, same grounds, same ruling, exception.)

A. Well, some of them were considerably prior to that, between the time that that grant—the execution was issued and the time that Mr. Cooper went down there. The last conversation, my recollection is, was just before Mr. Cooper went down.

(Motion to strike out answer, denied, exception.)

811 Mr. WITHINGTON: Now we offer to show——

Mr. ROBERTSON: We object to counsel's stating offers here in the presence of the jury. It is not proper practice.

Mr. WITHINGTON:

Q. Will you state what was said at these interviews?

Mr. ROBERTSON: Objected to as incompetent, irrelevant and immaterial and hearsay.

(Question read.)

Mr. WITHINGTON: With reference to the delivery of this railroad property to Bierce & Co., to W. W. Bierce & Co.?

Mr. ROBERTSON: Object to the question on the grounds that it is irrelevant and immaterial and hearsay, your Honor.

The COURT: I understand the plaintiff or no representative of the plaintiff was present?

Mr. WITHINGTON: No.

(Objection sustained.)

Mr. WITHINGTON: Now we offer to show by this witness——

Mr. ROBERTSON: We object to counsel's stating an offer.

(Jury retires.)

Mr. WITHINGTON: We offer to show by this witness that at these interviews, and particularly at the last interview before Mr. Scott returned to Kona, as already testified to, Mr. Hutchins and their counsel, Mr. Cathcart, in his presence, directed him to use all his efforts to redeliver the property involved in the replevin suit to Bierce & Co., and assist them in all ways, and to—and particularly to—in case any action was taken down there to offer to deliver and to offer to assist.

(Jury recalled.)

The COURT: I suppose this offer does not call for any ruling; the court has already sustained the objection.

812 Mr. WITHINGTON: We desire to except to the ruling.

Now I would like also to have it appear that this offer was made without the presence of the jury, at the suggestion of the other side,—no advantage taken of us for that reason.

The COURT: The record will show that.

Mr. PROUTY: We object to the offer, your Honor.

The COURT: The court holds that the evidence is inadmissible; the offer will be rejected.

Mr. WITHINGTON: We except.

Mr. ROBERTSON: We now move to strike out the testimony just given by Mr. Cathcart since he was recalled here on the ground it is irrelevant and immaterial and has no possible bearing on any issue in this case.

The COURT: That would necessarily follow. It may be stricken out and the jury will disregard the questions and answers.

Mr. WITHINGTON: We except.

Mr. CATHCART: If the court please, reserving the right to introduce the documents which we have called upon the plaintiff to produce the defendant is now prepared to rest.

The COURT: You will have that right, the right to offer them will be reserved. I understand with that reservation you do rest?

Mr. CATHCART: We rest.

(Jury excused until 1:30 P. M.)

813

Afternoon Session.

MAY 18, 1908.

Mr. ROBERTSON: A little after 11 o'clock this morning we made careful search of all the papers relating to this litigation and also of the correspondence between Kinney and McClanahan's firm covering the period, and we find no option nor any copy, no original of an option or any copy of it, among any of the papers or any of the correspondence.

Mr. CATHCART: The defendant rests, if the court please.

Mr. PROUTY: May it please the court, we desire to make a motion. We would like to have the jury excused while we argue it.

The COURT: If you wish to make a motion you have to make it in the presence of the jury.

Mr. PROUTY: Well, I desire on behalf of the plaintiff to move the court to direct a verdict for the plaintiff for the sum of \$28,156.74, and *are* ready to argue the application now.

Mr. WITHINGTON: I assume by that that the plaintiff rests?

Mr. PROUTY: No, we reserve the right to put on our rebuttal if the motion is overruled.

Mr. WITHINGTON: We object to the making of the motion without—

Mr. ROBERTSON: It is the constant practice of this court.

The COURT: I think the motion is in order.

Mr. WITHINGTON: We desire to raise that question.

The COURT: I think that the plaintiff has a right at this stage of the case to move for a directed verdict.

814 Mr. CATHCART: Without resting?

The COURT: Without resting.

Mr. CATHCART: We except to the ruling of the court.

Mr. PROUTY: If your honor please, my associate suggests that he thinks that the proper practice would be to state the grounds of our motion.

Mr. ROBERTSON: That I will do. The points of our motion are two; I will state them, I think, pretty concisely by saying that we

contend, first, that the defendant has not by—the defendants have not, by their evidence made out any case of a return of the property or of a tender of the property such as is legally sufficient to go to the jury, and secondly that all of the evidence offered by the defendants is offered for the purpose of contradicting or impeaching the return of the sheriff on the special execution issued on the judgment for the return of the property, and that that return imports absolute verity and is binding and conclusive upon the parties to the record and their privies.

(Jury retires.)

(Argument.)

815 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

W. W. BIERCE, LTD.,

vs.

WILLIAM WATERHOUSE et al.

MAY 19TH.

(Motion for a directed verdict overruled; exception by plaintiff.)

Direct examination of JOHN D. PARIS, called and sworn.

Mr. ROBERTSON:

Q. Where do you live, Mr. Paris?

A. At Kealahakua, South Kona?

Q. How long have you resided in South Kona?

A. Well, the greater part of my life, except the time I was at school.

Q. Did you know J. K. Nahale, deputy sheriff of North Kona?

A. I did.

Q. He is dead now is he not?

816 A. How? Yes.

Q. Do you remember when he died?

A. I think it was February of this year.

Q. Yes.

A. But it was early—the early part of this year, I think.

Q. I wish to show you a letter dated May 21, 1904, addressed to J. K. Nahale, purporting to be signed by J. D. Paris and others, and ask you if you have seen that letter before?

A. Yes sir, I wrote that letter.

The COURT:

Q. You wrote the letter?

A. Yes, wrote this letter.

Mr. ROBERTSON:

Q. Having written it what did you do with it?

A. I sent it to Mr. Nahale, I think; whether it was by mail or sent personally I am not sure, but I think I mailed it to him.

Q. Yes, on the date that it bears date, May 21st?

A. Well, I won't be sure of that now.

Mr. ROBERTSON: We offer this letter in evidence, if the court please.

Mr. CATHCART: We object to it as incompetent, irrelevant and immaterial.

Mr. PROUTY: This will be followed up by other proof relating to the same subject.

(Argument.)

The COURT: Well, I will admit this.

Mr. CATHCART: Exception.

(Letter read.) (Exhibit "MM.")

817 Cross-examination of JOHN D. PARIS.

Mr. CATHCART:

Q. These lands named in this notice, Mr. Paris, are lands that were either owned by you or by persons whom you represented?

A. They are; they are mentioned there, the names of those interested in those lands.

Q. Now at the time you served this notice the rails on that land were not the rails that belonged—that had been bought from the Bierce Co., were they?

Mr. ROBERTSON: We object. How does that witness know what rails were bought from the Bierce Co.? We object to the question on the ground that it assumes that he does know.

(Objection overruled; exception by pl'ff.)

A. Will you please repeat the question?

(Question read.)

A. I cannot swear to that one way or the other, although I have heard that they—

Mr. PROUTY: I object.

The COURT: What you heard is not evidence and will be stricken out and not considered by the jury.

Mr. CATHCART:

Q. What was the object of giving this notice?

Mr. PROUTY: I object to that.

(Objection overruled; exception.)

A. I had understood that there was going to be a levy on
818 the property of the Kona Sugar Co., and as the Kona Sugar Co. had no rights on these lands and were owing large amounts in arrears, I—on rents and so on, I objected to anybody taking anything off these lands without our knowledge or permission.

Mr. CATHCART:

Q. It was not, then, because the rails there were rails that were claimed by the Bierce Co., it was because they were about to levy on the property belonging to the Kona Sugar Co., is that right?

(Objected to as incompetent, irrelevant and immaterial and assuming a fact not in evidence. Objection sustained.)

A. I had no interest—I had no interest——

The COURT: Wait a minute. Don't answer the question; the court has sustained the objection.

Mr. CATHCART: Exception.

Q. Did you at that time think that the rails that were on your land were rails that the Bierce Co. had any claim or title to?

(Objected to; objection sustained.)

Mr. LEWIS: We note an exception to the ruling of the court.

Mr. CATHCART:

Q. Do you know when those rails on that property were laid?

A. I do not.

The COURT:

Q. You do not, you say?

A. I don't remember exactly the time it was laid.

Mr. CATHCART:

819 Q. Was any request ever made for permission to remove the rails by Mr. Nahale?

Mr. PROUTY: I object to that question, if your Honor please.

The COURT: The objection sustained.

Mr. CATHCART: Exception.

Mr. LEWIS:

Q. Mr. Paris, when did you have first knowledge that these rails were on your lands that you speak of?

Mr. PROUTY: I object to that, if your Honor please. One counsel should examine a witness.

Mr. CATHCART: I will adopt the question.

Q. When did you have first knowledge that the rails on your land were not the Bierce Co. rails?

Mr. PROUTY: I object to that, if your Honor please, because the witness has stated that his knowledge was hearsay.

(Argument.)

The COURT: I will permit the question, as long as there seems to be some confusion. You may answer the question.

Mr. CATHCART: Well, of your own knowledge can you say, Mr. Paris?

A. When they were laid?

Q. When the rails were first——

A. I cannot.

Q. The lands that you speak about in that notice are lands that are furthest from the mill, are they?

A. They are furthest from the mill or—they are—our lands,

the first land borders on the Honalu, that is the furthest towards the mill, yes.

Q. The furthest away from the mill the lands are?

A. Yes, furthest away from the mill.

Q. And the further end of the railway is on these lands,
820 isn't it?

A. There are, I should say, about a mile or a little over on this railway—that is the end of the railway, yes sir.

Q. The end furthest away from the mill?

A. Yes sir.

Q. Did you at any time ever make the claim that these rails on your land were the so-called Bierce rails?

Mr. PROUTY: I object to that question, your Honor please, as immaterial and not binding upon us in any way.

The COURT: Objection sustained.

Mr. CATHCART: Exception. That's all.

Mr. PROUTY: I move to strike out the answer of the witness as to the location of the lands mentioned in the paper with reference to the mill, on the ground that there is no evidence of that fact being brought to our knowledge, the knowledge of the plaintiff in this case, or any of its representatives, or of the deputy sheriff.

The COURT: Motion will be denied.

Mr. PROUTY: Note an exception.

821 Direct examination of H. E. COOPER, called and sworn.

Mr. ROBERTSON:

Q. Mr. Cooper, were you a member of the law firm of Kinney, McClanahan & Cooper?

A. I was.

Q. And were you such at the time when that firm was acting as the attorneys for the William W. Bierce Ltd?

A. Yes.

Q. In connection with the execution that had been issued in the replevin case of Bierce against Hutchins I will ask you whether or not you went to North Kona, Hawaii?

A. I did.

Q. I will show you the execution issued in that case on the 15th of April 1904, returned May the 27th, and ask you if you remember seeing that before?

A. This is the execution that I took with me to Kona.

Q. Do you recollect the date of your arrival in North Kona with this execution?

A. I remember it was a Saturday morning, some time in about the middle or latter part of May 1904; I couldn't say the day of the month.

Q. I call your attention to the date of the return of the Deputy Sheriff on the 23rd of May and ask you if the Saturday you refer to was the Saturday next preceding that date. May 23rd?

A. Yes.

822 Q. You are acquainted with M. F. Scott of North Kona?

A. I am.

Q. You went up on the Mauna Loa, I presume, did you?

A. I did.

Q. Landed at Kailua?

A. Yes.

Q. On your arrival at Kailua with this execution what did you do?

A. I telephoned to Sheriff Nahale first; asked him to come over to Kailua, telling him that I had this execution. I waited at Kailua for several hours; he didn't come, and I went over myself to his beach residence, some three or four miles south of Kailua.

Q. You mean Nahale's?

A. Yes. Had a conference with him there, saying that I intended to demand possession of the property——

Mr. CATHCART: We object to any conference that he had with him there.

The COURT: Objection sustained.

Mr. ROBERTSON: Exception.

Mr. CATHCART: We object to anything that was said there at the time and move to strike out the words "I told him I was going to demand."

The COURT: That may be stricken out and the jury will disregard that.

Mr. ROBERTSON: Proceed, Mr. Cooper.

The COURT:

Q. That is, after having this conference what next occurred?

Mr. ROBERTSON: Yes.

Q. I might ask you whether or not you handed the writ to the deputy sheriff?

823 A. Not at that time.

Q. Simply told him you had it?

A. Yes.

Q. Yes; then what?

A. Well, I told him what I intended to do——

Mr. CATHCART: Well, if the court please, we move to strike out what he told him. That is not evidence, anything that he said to him there at all, what he said to him.

(Motion to strike out denied. Exception by defendants.)

Mr. ROBERTSON:

Q. Then what?

A. The result of my conference was that he was to meet me on Monday morning following.

Q. Meet you where?

A. We arranged to meet on the upper or main government road running through the district.

Q. And where was that; where *you* that point be with reference to the Kona Sugar Co's. plantation?

A. Up above the plantation.

Q. What distance?

A. What distance?

Q. What distance, approximately?

A. Oh, half or three quarters of a mile, perhaps, possibly a little bit more.

Q. Well, having made that appointment with the deputy sheriff what next did you do?

A. I went up, went back to Kailua, and started for the McWayne's, where I had made arrangements to stay during my visit there. The McWaynes lived on the upper road.

Q. Did you see M. F. Scott that day?

824 A. I did.

Q. And where did you see him?

A. I think I saw him at the postoffice; the postoffice is in a large building and I don't know but what he may have been living in the same building; anyway I think I saw him at the postoffice or plantation store, same large building on the mauka side of the upper road.

Q. Yes. Did you have any conversation with Mr. Scott on that day?

A. I did.

Q. All this has reference to the first day of your arrival?

A. Saturday, yes.

Q. As I understand, Saturday, yes.

A. Yes.

Q. Well, what conversation did you have with Mr. Scott?

A. I told him I had come up there to get the materials belonging to Mr. Bierce, and I won't begin to state the exact conversation that took place between us; I wouldn't attempt to do so.

Q. Well, the substance of it?

A. The result of it was that he said that I would have difficulty in accomplishing my purpose, and the result was that I understood from him that he would object—

Mr. CATHCART: We object to what he understood from him.

Mr. ROBERTSON: Well, state as near as you can, Judge Cooper.

Mr. CATHCART: Move to strike out where he says that he understood.

(Stricken out. Exception by plaintiff.)

A. Well, the result of the conversation was that Mr. Scott would interfere in my taking possession of the property.

Mr. ROBERTSON: What was that?

825 A. Would interfere—

(Objected to as being a conclusion drawn by the witness and motion made to strike out.)

The COURT:

Q. Did he say he would interfere?

A. I can't repeat the exact wording; it is a long time ago.

(Motion to strike out renewed. The court strikes it out for the time being.)

Q. What we want of course, is the substance of the conversation as you best remember it, without the conclusions.

A. Well, I can't repeat the exact conversation; it is impossible.

Mr. ROBERTSON: You are not expected to, of course.

A. I wouldn't attempt to. I remember that I explained to Mr. Scott how I intended to do it.

Q. Well now——

A. If I could get control of the rolling stock it was a very easy matter to run to the end of the track and take the rails up from that end and bring them in. I remember his calling attention to the physical difficulties,—that the track was covered up with lantana, we couldn't get it in that way, that is one thing he said, and also that he would see that I didn't get the rails. That is the substance of the conversation; I can't tell the exact words, wouldn't pretend to.

Q. You are not required to give the exact words, of course. State whether or not you told Mr. Scott that you had the execution?

A. I think I mentioned that to Mr. Scott on the steamer; we came up on the steamer together.

826 Q. From Honolulu to Kailua?

A. Yes.

Q. I see.

A. I also told him that I had made arrangements with the sheriff to be at the mill on Monday morning.

Q. Yes. At any time during the conversation that you had with Mr. Scott on that Saturday did he say to you that he was able and willing and ready to put you in possession of that property?

A. He certainly did not.

Q. You say that you told Scott that you had an appointment with Nahale on Monday. Did you make any appointment with Scott for Monday?

A. No, I did not.

Q. Did you see anything further of or have any further talk with Scott on that Saturday than what you have already mentioned?

A. No.

Q. Did you see Scott on Monday?

A. I did.

Q. Where did you see him on Monday?

A. On the outside of the fence that marked the southern boundary of the Kapiolani Estate property.

Q. Yes. Did you see Nahale that Monday morning?

A. I did.

Q. Who did you see first, Nahale or Scott?

A. Oh, Nahale.

Q. Where did you meet Nahale?

A. I met him on the main road, he going north and I coming south. I being in a carriage and he on horseback.

827 Q. When you met Nahale what did you do?

A. He had a policeman with him on horseback.

Q. Yes.

A. The policeman got off the horse and I got out of the carriage and got onto his horse and we proceeded, turned about and going south on the road until we came to a place, rather a narrow lane or opening in the fence, and Nahale suggested going that way to the mill rather than going around the main road, and we went down that way, went down by the Kona——

Q. Kind of a short-cut, was it?

A. Yes.

Q. Yes.

A. Went down by the Kona Orphanage buildings and entered the premises of the Kapiolani Estate that way from the rear; I call it the rear because the other frontage was towards the main road.

Q. Yes; when you arrived at the Kapiolani Estate premises state whether or not anyone was in possession of those premises?

A. There were several men there, yes.

Q. Do you recollect who any of them were?

A. I remember that one of the Colburn boys was there.

Q. Yes.

A. Appeared to be in charge of the place.

(Motion made to strike answer as being conclusion of the witness. Motion to strike denied. Exception by defendants.)

Q. When you and Nahale arrived at that place what did you do?

A. I made a demand on Mr. Colburn for the possession of
828 the material on the premises.

Q. Do you remember what portion of the material in question was on those premises?

A. Well, there were two locomotives, several cars, and there were several tracks laid through the yard,—the main track, as I remember it, and I think one switch, possibly two switches, side-tracks.

Q. Yes; when you made demand on Colburn for the possession of that property what did he do or say?

A. He refused to give possession of the property.

Mr. CATHCART: It seems to me that is a conclusion of the witness. We are entitled to know what he said and let the jury draw the conclusion, not this witness. I therefore move to strike it out, if the court please.

The COURT: It may be stricken out. You can give your best recollection, Judge.

A. I can't tell the exact words, Judge DeBolt. I am simply—it is farthest from my position to do any injustice in testifying in this case; I want to testify only as I remember it.

Mr. CATHCART: Yes, but Mr. Cooper, if the court please, is a lawyer and knows what is admissible and what is not admissible and we submit that he has to exercise that knowledge a little bit in giving his testimony here.

The WITNESS: I suggest that is exactly what I shouldn't do. I am here exactly as a witness and not as a lawyer, and I am giving things as it appears to me today.

The COURT: Well, I give us your best recollection as to what he said when you demanded possession of the property.

829 A. I cannot remember the conversation, Judge, as to his method of speech or what he said or what I said; I simply made a demand on him; I asked him, I think, if he was in charge of the place. He said he was. I asked him whom he represented; he said he represented the Kapiolani Estate; I remember that part of it. I can't remember what was said in the way of his refusal; I remember that we talked it over. The result of the conversation was that he wouldn't deliver the property; I can't do it better than that.

Mr. CATHCART: We move to strike out what the result of the conversation was. It is not for the witness to tell us whether there was a refusal or not; it is for the jury to tell from all the evidence in the case.

The COURT:

Q. Can you remember more particularly, Judge Cooper, what was said?

Mr. CATHCART: I would like to have it stricken out, so as to have the record straight.

A. No, I don't think I can, Judge.

The COURT: I think the answer is sufficient under the circumstances. The motion to strike will be denied.

Mr. CATHCART: Exception.

Mr. ROBERTSON:

Q. Well, when you demanded of him the possession of this property was his reply affirmative or negative?

(Objected to as already been asked and answered. Objection sustained.)

Q. Well, I will put it this way; was the substance of Colburn's reply to your demand for the possession of that property to the effect that he would not deliver it to you?

(Objected to as already asked and answered, and further as leading. Objection sustained. Exception by plaintiff.)

830 Q. Did you have any conversation with M. F. Scott that Monday morning?

A. Later on.

Q. That is after you had made the demand on Colburn?

A. Yes.

Q. Well, where did the conversation with Scott take place?

A. At this fence on the southerly boundary line of the Kapiolani tract.

Q. On the south boundary line. Which side of the fence were you?

A. Well, first I was on the northerly side of the fence going through the Kapiolani Estate lot.

Q. Yes.

A. We were following—I was following along the track laid in the yard.

Q. I see; and you met Scott on the outside of the fence along the boundary of the Kapiolani Estate premises, did you?

A. Yes.

Q. Who if anybody was with Scott?

A. I think Mr. Conant was with him.

Q. So that there were four of you there,—you and Nahale and Scott and Conant?

A. Yes, and Colburn and the three or four men that were with him followed us up; there were quite a number there.

Q. Do you remember who the others were besides Mr. Colburn?

A. They were Hawaiians; I don't know the names; young men.

Q. While you were there did Scott make any attempt to get into the premises of the Kapiolani Estate?

A. I think he did, once or twice.

Q. Well, did he succeed or not?

831 A. Well, he was prevented by Colburn, young Colburn.

Q. Yes.

A. Scott made the attempt and Colburn made a dash at him and Mr. Scott—

Q. Retired?

A. Desisted.

Q. Yes; and you remember what conversation you had with Scott at that time?

A. Not very clearly, excepting I called attention to the—his attention to the fact that some rails had been torn up on the outside of the fence.

Q. Yes, as to that point, where did you see rails torn up?

A. On the—on the other side, one or two lengths taken up on the inside of the Kapiolani Estate lot and there were two or three hundred feet of rails taken up on the outside of the lot.

Q. Did you notice where those rails were lying?

A. Some of them were piled up against the fence and some of them lying down on the side of the bank; it was quite a grade through there, and in some portions—

Q. Were those rails of the main track?

A. Yes.

Q. Was there any other track by which the locomotives on the Kapiolani Estate premises could have been rolled off and taken out?

A. No.

Q. State whether or not the Kapiolani Estate premises were fenced on the north side as well as the south side?

A. I think they were, yes.

Q. Well, on that Monday did Mr. Scott offer to deliver to
832 you any of this Bierce property?

A. He certainly did not.

Q. Were you able to get possession of any of it?

(Objected to as calling for a conclusion. Question withdrawn.)

Q. As a matter of fact did you get possession of any of that property, either that which was on the Kapiolani Estate lands or on other lands?

(Objected to as incompetent, irrelevant and immaterial and a conclusion of the witness. Objection overruled; exception by defendants.)

A. I did not take possession of it.

Q. I will ask you if at any time while you were there at Kona you delivered this execution to Nahale?

A. I did, shortly after this incident I have just been testifying about, after I had had the talk with Mr. Scott, I delivered the execution to Nahale and asked him to execute it.

Q. Nahale was in hearing of your talk with Scott, was he?

A. O yes, we were all standing together.

Q. And also in hearing of your demand on Colburn?

A. Yes, he was present.

Q. What if anything did Nahale do with the execution, if you know?

A. I am not quite sure that I can say; I wouldn't want to say, Mr. Robertson, what he did do with it.

Q. Well, he subsequently made a return of it, did he?

A. He did, yes.

Q. And after he had made his return of the execution what if anything did you do with it?

833 A. I took it and brought it back and returned it to the court when I came back on the steamer.

Q. How long subsequent to May 1904 did you remain in the firm of Kinney, McClanahan & Cooper?

A. I went out on May first, 1905.

Q. And that was the end of your connection with that firm, was it?

A. Yes.

Q. Do you know where E. B. McClanahan and S. H. Derby are now?

A. I know they left the Territory some months ago.

Q. Last year, wasn't it?

A. Bound for—Yes—San Francisco.

Q. On this occasion of your trip to Kona that you have referred to did you have any further business that took you there other than the service of this execution?

A. That was the sole purpose of my visit.

The Court:

Q. How far is it from here, if you know, Judge Cooper, to the Kona Sugar Co's. property?

A. From here?

Q. Yes.

A. 170 miles, I should say.

Q. How long did it take you to make the trip?

A. Oh, I left here on the Mauna Loa at 12 o'clock noon and arrived in Kailua about four o'clock in the morning next day.

— Following morning?

A. Yes.

Q. I mean how long did it take you to make the round trip down there and back?

A. Left on Friday and got back on Friday, as I remember it.

834 Q. About a week?

A. Yes.

Mr. ROBERTSON:

Q. And of that week you were about five days in the district?

A. Yes.

Q. Allowing two days for going and coming?

A. Yes.

Q. Did you take part in the trial of the replevin action of Bierce against Hutchins?

A. No part.

Q. You weren't connected with Kinney & McClanahan's firm at that time?

A. No, I went into the firm on November 5th, 1903.

Q. Yes; well, you were in the firm then at the time of the trial in March 1904?

A. Yes, I was in the firm but took no part in the trial of it.

Q. And while you were a member of the firm of Kinney, McClanahan and Cooper, did Clinton J. Hutchins, Trustee, at any time make a delivery of this property to your firm as attorneys for the Bierce company?

(Objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness and a matter in litigation here which is to be passed upon by the jury. Objection sustained. Exception by plaintiff.)

Q. While you were a member of that law firm, and as the attorneys of the Bierce company, did your firm ever receive from Clinton J. Hutchins, Trustee, the property which was the subject of the replevin case?

(Objected to as being incompetent, irrelevant and immaterial, calling for a conclusion of the witness, and one of the matters in issue here which has to be decided upon by the jury, and further as leading. Objections sustained. Exception by plaintiff.)

835 Q. At any time while you were in Kona on this trip that you have referred to was Mr. Clinton J. Hutchins there?

A. He was not there.

Q. Did the firm of Kinney, McClanahan and Cooper ever actually receive the property in question or any part of it from Hutchins or anybody on his behalf?

(Objected to on the same grounds; merely repeating the question on which the court has ruled. Objection sustained; exception by plaintiff.)

Cross-examination of HENRY E. COOPER.

Mr. CATHCART:

Q. You say that you went into the firm of Kinney, McClanahan & Cooper on November 5th of 1903?

A. Yes.

Q. And remained in the firm until May first of 1905?

A. Yes.

Q. The firm at that time consisted of Mr. Kinney, Mr. McClanahan, yourself and Mr. Derby, did it not?

A. In the beginning also Mr.—young Dole was connected with the firm, although not a member of the firm.

Q. Not a member of the firm, but his name was on the letter-heads, was it not?

A. I think so.

836 Q. But the other persons that I have mentioned were members of the firm during that period of time?

A. Yes, and no; I should say there was not a division of profits between the other members of the firm and Mr. Kinney on the same terms that the other members would be compensated for their services—

Q. We don't care about how the large profits were divided up, Judge, so long as any of you were members of the firm, that is all I wanted to know.

A. Yes, we were all associated in business.

Q. Were you the member of the firm that received this execution from the clerk of the court?

A. I was.

Q. Did you get it on the day that it was issued?

A. My recollection, Mr. Cathcart, is that the document was dictated by Mr. Derby and written out by Miss Clark, who was our stenographer; so soon as it was completed I took the document to the clerk as it was then issued.

Q. And you took it back with you to the office?

A. Beg pardon?

Q. After the clerk issued it you took it back with you to the office?

A. I did, yes.

Q. So that you took it back, you had it issued and you took it back with you to the office on the date of its issuance, the 15th day of April 1904?

A. That is my recollection, yes sir.

Q. Now you kept the execution, did you, in your possession until you delivered it over to Mr. Nahale on Monday, the 23rd day of May 1904?

A. I don't know whether Monday was the 23rd, Mr. Cathcart.

837 Q. Well, you have testified to that.

A. I had it in my possession until I delivered it to him on Monday; whether Monday was the 23rd or not I cannot say.

Q. Well, it was Monday that you delivered it to him?

A. Yes.

Q. And it was the same day that you had the conversation with young Colburn at the mill and with Scott just at the boundary line of the so-called Kapiolani tract?

A. The same day.

Q. And it was after the conversation that you had with Mr. Scott that you delivered it over to the sheriff?

A. Yes.

Q. And did you receive it back from him the same day with his return on it, do you remember?

A. To my recollection not.

Q. You left there on the Thurs—left Kailua on returning to Honolulu on the morning of Thursday following this Monday, did you not?

A. Yes.

Q. And sometime between that Monday and the time you left there you received the execution from him and brought it back with you to file it here with the clerk of the court, did you?

A. My recollection is I received it on Thursday morning.

Q. And brought it back with you?

A. Yes.

Q. And filed it up in the clerk of the court's office. You say Scott was on the Mauna Loa going down to Kailua at that time, was he?

A. That is my recollection, yes sir.

838 Q. And you reached there on a Saturday morning?

A. Yes.

Q. You don't remember just the day of the month?

A. No, I don't; I can't state the day of the month.

Q. You say you arrived in Kailua at four o'clock in the morning?

A. I remember it was early in the morning; my recollection is it was about that time.

Q. Before daybreak?

A. Yes.

Q. And did you at once telephone down to Nahale on your landing there, do you remember?

A. No, I went up—my recollection is I went to Mr. Curts' house. Mr. Curts, a friend of mine; I think I had breakfast there first before I telephoned to Nahale.

Q. About what time was it that you saw Nahale, do you know?

A. Difficult to say the hour of the day; my impression is it was before noon that I got to his house.

Q. You can't state exactly?

A. No, I think I ate a lunch, a late lunch, at McWayne's after I got up there.

Q. After seeing Nahale and making this appointment with him

for Monday morning. Oh, was the hour fixed for the appointment with him?

A. I think there was an hour agreed upon.

Q. Do you remember the hour?

A. No; I couldn't say; I know it was an early hour.

Q. Sometime in the morning?

A. Yes.

Q. After making this appointment with him for the following Monday you drove up the road to the government road and then along that north towards McWayne's, did you?

839 A. Yes.

Q. You say you had this conversation with Mr. Scott in the post-office?

A. Well, perhaps I better say postoffice building. My recollection it was in the postoffice building; there was a postoffice in the building.

Q. This is back quite a little ways from the road, isn't it?

A. Oh, perhaps fifty feet; fifty or a hundred feet.

Q. Fifty or a hundred feet?

A. Yes.

Q. And you were inside the building when you had your talk with him?

A. That is my recollection, yes sir.

Q. Were you in a hack?

A. Yes.

Q. Driven around in what was called there a hack?

A. Yes.

Q. You got out of the hack and went into the building, did you?

A. I did.

Q. Did you see Scott before you went into the building, do you remember?

A. No, I don't know that I have any recollection of seeing him outside or before—after we parted, after leaving the steamer.

Q. He didn't drive up with you from the steamer, did he?

A. No, not to my recollection.

Q. So that from the time that he left the steamer up to the time that you saw him inside of this building you had not seen him?

840 A. No.

(Here the court adjourns until afternoon.)

Afternoon Session, May 19, 1908.

Cross-examination of HENRY E. COOPER resumed.

Mr. CATHCART:

Q. Mr. Cooper, you left Honolulu on Friday noon, did you, on the Mauna Loa to go down to Kona at the time you are speaking about?

A. Yes.

Q. And you say Mr. Scott was a passenger also on the boat?

A. That is my recollection.

Q. Before leaving that day or the day previous did you have any talk with Mr. Hutchins or with any of the Waterhouse Trust people relative to the object of your visit down there?

A. I remember speaking to Mr. Hutchins after I came home, but I don't remember any specific conversation, either with Hutchins or with the Waterhouse people, before I went.

Q. Did you call on the Waterhouse people before going down, to get any information relative to the property down there?

A. I have no recollection of it.

841 Q. Now on the trip down you say that you spoke to Mr. Scott, telling him that you had the execution with you?

A. That is my recollection.

Q. Was there any other conversation that you had with Mr. Scott outside of that that you remember of?

A. I have no recollection of any other.

Q. After your going to the building where the postoffice was where you saw Scott, after your conversation with him you went right on to McWayne's, did you?

A. I did.

Q. That is about a couple of miles further along the road?

A. Yes.

Q. And did you remain there the balance of Saturday?

A. Yes.

Q. Did you see Nahale again on that Saturday after you had left him at Nahale's house down below Kailua?

A. Not to my recollection.

Q. Now on Sunday you remained all day at McWayne's, did you not?

A. Yes.

Q. You didn't see Nahale on Sunday, did you?

A. No.

Q. Nor anyone else in connection with this property?

A. I did some telephoning on Saturday afternoon.

Q. Did some telephoning?

A. Yes.

Q. But you didn't see anybody personally?

A. Not to my recollection.

Q. Either on Saturday afternoon or Sunday?

A. No.

842 Q. Or Monday morning until you went down and met Nahale?

A. I have no recollection of seeing anyone on this business.

Q. This conversation which you had with Scott at the postoffice, or in a building that we will call the postoffice for convenience sake, about how long did that last, do you remember; that is to say, was it a short conversation or did it occupy some time?

A. No, it was a short conversation.

Q. Short conversation.

A. Very short.

Q. Did you go to him for the purpose of finding out the situation of the property, where it lay, its status?

A. No, I thought—I had understood that he was representing the Hutchins interests up there; I thought I would make one more attempt to see if I could get any delivery from him, my purpose being to take the property if I could get it peaceably.

Q. You didn't ask him anything then in regard to where the property lay?

A. No, I knew where it was; I had been there on a former occasion.

Q. You had been there?

A. Yes.

Q. When had you been there before?

A. It was in, I think November of the year previous.

Q. And had gone over the property?

A. Yes.

Q. And had gone along the track?

A. I didn't go the whole length of the track; I went through the mill lot and out beyond the first cattle-guard where Mr. 843 McChesney was killed, and some way beyond, a mile or two, perhaps.

Q. That would cover about how many miles of track, Mr. Cooper?

A. Oh, perhaps a mile and a half.

Q. From the mill?

A. Yes.

Q. You say that Scott told you that you would have difficulty in getting—You explained to him that your idea was to run the cars down along the track and load the rail^d onto the cars and bring them back, is that the idea?

A. Yes.

Q. And he told you that you would have difficulty in doing that because of the track being overgrown with lantana?

A. He mentioned that as one of the physical difficulties in the way.

Q. One of the physical difficulties?

A. Yes.

Q. Did you see any lantana at all on the track that you saw?

A. I don't remember that I did.

Q. Didn't you know at that time that the track had been in constant use for some year or so before, up to about two or three months before your visit there?

A. No, I don't; I didn't know that.

Q. Didn't know that?

A. Didn't know that, no.

Q. Wasn't it in use in November when you were down there?

(Objected to as irrelevant and immaterial and not proper cross-examination. Objection overruled: exception by plaintiff.)

A. I don't remember whether it was or not, Mr. Catheart, 844 I know I had no difficulty in getting along the track.

Q. Now you say that Scott told you that he would prevent your getting the rails?

A. That was the substance of his conversation.

Q. Now isn't it a fact, Mr. Cooper, that Scott told you that any assistance that would be necessary, that you would wish, that he would give to you in getting the rails?

A. Quite the contrary.

Q. What?

A. Quite the contrary.

Q. Quite the contrary. Was anything said at that time about a claim that the Kapiolani Estate might make in reference to the property?

A. By Mr. Scott?

Q. Yes.

A. I have no recollection of such a conversation.

Q. And [did he say]* didn't you say at the time that your relations with the Ka-iolani Estate were very amicable and that there would be no trouble about that, or words to that effect?

A. I am quite sure that is not so.

Q. As a matter of fact your relations with the Kapiolani Estate were amicable then, were they not?

(Objected to as irrelevant, immaterial and incompetent. Objection overruled; exception by plaintiff.)

A. I think there had been some treaty with the Kapiolani Estate about taking this property, negotiations for a sale to the Kapiolani estate.

(Plaintiff moves to strike the answer out on the ground it is incompetent, irrelevant and immaterial, and a mere conclusion of the witness and not proper cross examination, not responsive. Answer stricken out and exception by defendants.)

Q. Your firm was at that time acting as attorneys for the Kapiolani Estate, were you not?

(Objected to as irrelevant and immaterial and having no bearing on any issue in this case; improper cross examination.)

The COURT: As attorneys in this matter, you say, or generally?

Mr. CATHCART: Well, the general question is now asked. I had a right to show what the relations were existing between that firm—

(Objection overruled; exception by plaintiff.)

A. We were doing a very considerable business for the Kapiolani Estate as lawyers.

Q. And you were their attorneys and appearing for them, were you not, in the writ of certiorari that was being brought before the supreme court to set aside the writ of possession under which they were—claimed to hold this property?

(Same objection, same ground. Objection overruled; exception by plaintiff.)

[* Words enclosed in brackets erased in copy.]

A. That is my recollection.

Q. You had not been to the mill, until, you went down on that Monday morning?

A. Not on that visit, yes.

Q. I mean this visit. When you were there in November the Kapiolani Estate and Colburn were not there were they, at all, in possession of the mill?

A. Not that I remember of, no.

Q. You mentioned to Scott, did you, on the occasion of your interview with him, that you were going to meet Nahale down at the mill, did you?

A. I told him that I had made an appointment with Nahale to be at the mill on Monday morning.

Q. And that was the appointment that you told him about, was it?

A. Yes.

Q. The appointment that you made with Nahale was to meet Nahale up on the government road, wasn't it?

A. That was the arrangement that I had with Nahale, yes, individually, yes; we would meet there first and should go to the mill.

Q. Did you tell Scott at what time you would be there?

A. No.

Q. You remember meeting Nahale and getting out of your hack and onto the horse of the policeman and starting down a trail with Nahale?

A. Yes sir.

Q. He led you along a trail past the Orphanage, Kona Orphanage?

A. Yes.

Q. And into the mill by the back way?

A. Yes.

Q. Now when you got there onto the mill property I suppose you dismounted from your horse, did you?

A. That is my recollection, yes.

Q. And did you see anything of Scott there at that time?

A. No.

Q. Then you went and saw Colburn, young Colburn?

A. Colburn was there near to where we came in.

Q. Near where you came in?

A. Yes.

847 Q. And did he go with you up to the mill?

A. Well, the mill is all that small enclosure. I went through the mill with him after we had had this talk; I didn't know where Scott was or had no idea of meeting him. After we had the talk about the material we went through the mill again and looked it over,—rather a curiosity to me.

Q. I mean when you first got on the premises yourself.

A. Well, we had the talk about the material before we went into the mill.

Q. Yes; so you met him then as soon as you arrived on the mill premises?

A. Colburn?

Q. Yes.

A. Yes.

Q. And you say there were others there?

A. Some other young men there with him.

Q. Another young man?

A. Oh, I think there were three or four.

Q. Did you see Conant there at that time?

A. No, I didn't see Conant until I saw Scott.

Q. Well now, then you had your talk with Colburn?

A. Yes.

Q. And you asked him to give up the property?

A. I told him I had come for that purpose of—of taking the property if I could get it; asked him to deliver it to me. I am not attempting to say the exact words that passed between us.

Q. O no, we know that; we don't expect that at this distance of time, unless you made a memorandum of it,—and you made no memorandum of the conversation?

A. No, I made no memorandum.

848 Q. Well, you asked him as I understand, in what capacity he was there?

A. Yes.

Q. Then you followed that up by asking him for the property?

A. Yes.

Q. And he refused to give you the property?

A. Yes.

Q. Any or all of it?

A. I think there was no exception made to it.

Q. No exception made. Was Nahale there with you then?

A. Yes.

Q. Then after that conversation you went through the mill, did you?

A. Yes.

Q. And came out from the mill and went towards the front boundary, the south boundary?

A. After we came out then I followed the main track along through the yard and went towards the south boundary.

Q. And that was the first time that you saw Scott?

A. That is my recollection of it, yes sir.

Q. And that was the first time that you saw Conant?

A. That is my recollection also.

Q. And you remained on the inside of the fence on the so-called mill property and Scott and Conant on the other side, is that right?

A. I am not so sure about Scott—about Conant being on the other side.

Q. Scott was—

A. Mr. Scott was on the other side but I am not sure about Mr. Conant; in fact I am rather inclined to think Mr. Conant was in the yard, but I won't be sure about that.

849 Q. Now didn't Scott at this time,—mind you we are referring now to the conversation that you had with Scott when you met him on the mill property; that is, when you were on the mill property and he was outside, on the Monday, the 23rd day of May,—didn't Scott at that time offer to turn over, or to assist you in getting, any of the property that you wanted?

A. No.

Q. Did he serve, did he hand you any paper at all?

A. Did not.

Q. Didn't hand you any. I show you defendant's Exhibit "9" and ask you to look at that and examine it. (Showing document.) Did you ever see that paper before, or a copy of that, Mr. Cooper?

A. To the best of my recollection I never saw it before.

Q. And did Mr. Scott hand any paper to Mr. Nahale at that time?

A. I don't remember of any such action on his part.

Q. You say Mr. Scott didn't hand you a copy of this?

A. Not to me.

Q. —notice that I have shown to you?

A. Not to me.

Q. You can't say positively whether he handed a copy to Mr. Nahale or not?

A. No.

Q. Did you not at that time say to Nahale, "I decline to accept the property. It does not belong to Scott, Hutchins or anybody else," or words to that effect?

A. No.

Q. Didn't say that?

A. It couldn't be so, because my conversation—

850 Q. I am asking you whether you did. Never mind arguing; I simply want the fact of whether you did or not.

A. No.

Q. Now what was the conversation that you had with Scott there? Do I understand you to say that you had a conversation with Scott there on the premises?

A. Yes.

Q. Now what was said by him to you or by you to him, do you remember?

A. I asked him who went ripping up the rails on the outside of the fence.

Q. Yes.

A. He said he had been doing it, or that he had been—had caused it; not that he had done it personally but that he had had it done.

Q. That he had caused it to be done?

A. Yes.

Q. What else was said?

A. I don't remember; that is the principal item of conversation that I remember.

Q. It was a very short conversation then?

A. Yes, not much said.

Q. Not much said, and then did he and Conant go away?

A. My recollection is that we opened the gate—there had been a gate or bars or some temporary obstruction put across the track, and my recollection is that was taken down and Nahale and I and the policeman went away, went down the embankment on the right of way to the road and then went down to Kailua.

Q. Nahale and the——

A. Nahale and the policeman and myself.

851 Q. Oh, the policeman was with you all this time, was he?

A. Yes.

Q. He came on foot?

A. He came on foot down behind us.

Q. And did you notice, did you see what became of Scott and Colburn?

A. No, I don't remember about that.

Q. Scott and Conant.

A. Conant, my recollection—if I recollect right we left them there, all of them.

Q. Left them there?

A. Yes.

Q. And now as I understand you, Mr. Cooper, after you had gone through the mill with Colburn, you and Nahale and the policeman walked along the track towards the south boundary of the land?

A. Yes.

Q. For the purpose of leaving and going away from the premises?

A. Yes.

Q. As you got to the fence, as we will call it, the fence, gate or whatever it was, you saw Conant and Scott there, is that the idea?

A. Yes, that is my recollection of it. I am sure I saw Scott there and I think Conant was also there; Conant may have been further into the yard, possibly.

Q. And as you passed along you had this conversation with Scott?

A. We stopped at the fence there a moment.

Q. How long were you there?

A. A very short time.

852 Q. Well, can you give us some idea? Was it any longer than was necessary for the purposes of this conversation?

A. Well, that would be my recollection. There was no occasion for me to stop any further. Saw part of the track had been torn up on the inside of the fence and part of the track — been torn up on the outside of the fence, and I inquired about the tearing of the rails up. Colburn had taken up—Colburn had taken up, I think, the rails on the inside; Scott had taken up the rails on the outside.

Q. And Scott told you that?

A. Yes.

Q. And then you and the policeman and Nahale continued on and left the premises?

A. We opened the gate; the gate was opened or the obstruction

was taken down, and we walked along the ties towards the government road.

Q. Got onto the government road?

A. Yes.

Q. And then went down to Kailua?

A. My recollection is I went down to Kailua, yes.

Q. And what sort of a——

A. Went on the horse I think.

Q. Went on your horse?

A. Either that or my carriage had come around in the meantime to get me; I couldn't say that, whether the carriage had come around to get me at the road or whether I rode down on the horse.

Q. Sure you went down to Kailua?

A. I am quite sure I went down to Kailua.

Q. And with Nahale?

A. Yes.

853 Q. And with the policeman?

A. I am not sure about the policeman going.

Q. You don't know how Nahale went down there, whether he went down in your carriage?

A. No, he went on horseback.

Q. He continued——

A. He was on horseback all the time.

Q. As you walked along this track towards the gate from the mill you say that Colburn and his companions followed you up?

A. Through the lot, you mean?

Q. Yes, as you walked along to the gate.

A. Yes.

Q. And were they with you or in company with you or quite a ways behind you?

A. We were all going along together; I couldn't say who was first or who was last; we were all in company.

Q. You were all together, that is the idea?

A. Yes.

Q. And while you had a conversation with Scott, Colburn was there, was he?

A. Yes.

Q. And his companions were there too?

A. Well, they were near by.

Q. You say that some of the rails had been taken up inside of the fence?

A. Yes.

Q. How much did you say?

A. Oh, I should say a length or two. There were rails taken up on the north boundary and on the south boundary as well.

854 Q. You noticed that as you came into the premises, did you?

A. Yes.

Q. On the north boundary?

A. Yes.

Q. Did you come into the premises over this track on the north boundary?

A. No, we came in for—well, I should say from the north.

Q. What would it be, north east, north east corner?

A. No, it would be the mauka, corner of the mauka.

Q. The north mauka—

A. Mauka Waimea; I can describe it better that way than by points of the compass.

Q. And you didn't have to pass this track going to the mill, did you?

A. Well, it was right over close to the entrance to the mill.

Q. Eh?

A. It was over close to the entrance.

Q. Where the rails were taken up?

A. Yes.

Q. And you can't say whether there was one length of rail or two lengths?

A. Well, there were several pieces of rail up, lying down aside of the track.

Q. Of the inside we are speaking about now.

A. Yes.

Q. Can you say whether it was one length or two lengths of rails?

A. No, I don't know that I could be as definite as that. There were several pieces lying right alongside.

855 Q. Right alongside?

A. Yes, of the track.

Q. And that was the same at the south boundary?

A. Yes.

Q. Inside?

A. Yes.

Q. Now outside of the south boundary you say there were about 200 feet of rails taken?

A. There was quite a length, I remember, walking over the ties after we got out through the obstruction.

Q. And your judgment is about 200 feet?

A. I should say so.

Q. And that is, outside of the fence on the south boundary and towards the government road there was about 200 feet of rails that had been taken up?

A. That is my recollection.

Q. And were they laid along-side of the track?

A. Some of them were down on the side in the grade and some had—appeared to me had been taken up and piled up against the wall, the wall just mauka.

Q. Stone wall?

A. Yes.

Q. Well, you went on down to Kailua with the sheriff, and did you see Scott again that day?

A. I don't remember of having seen him again.

Q. What did you do down at Kailua?

A. I think I telephoned to Mr. Paris.

Q. Telephoned to Mr. Paris.

A. Yes, J. D. Paris.

Q. From Kailua?

A. Yes.

856 Q. Well, after telephoning to Mr. Paris did you return to McWayne's?

A. Yes sir, sometime during the day I went back to McWayne's.

Q. Did you see the sheriff the next day at all?

A. I don't think I saw him again until just before I left.

Q. Thursday morning?

A. Yes.

Q. And you spent your time up at McWayne's, did you?

A. Yes.

Q. Didn't see Scott again, did you?

A. Not to my recollection.

Q. Had no conversation with him of any kind?

A. No.

Q. You didn't go back on the railroad track at all?

A. No.

Q. The only visit that you paid to the railroad track was the visit to the place there at the mill, was it?

A. Yes.

Q. Didn't go out at any time, didn't go out on the track?

A. No.

Q. Did you take notice how many cars there were on the mill premises?

A. I don't know that I can tell you the number, but I know that there were some missing.

Q. Some that were not there?

A. Yes.

Q. How many cars were there altogether, do you know?

A. I don't believe I can give you the number, Mr. Cathcart.

Q. How long were you on the mill premises that morning?

A. Perhaps half an hour.

857 Q. Eh?

A. Perhaps half an hour; not very long.

Q. Can you give us the time of day that you were there?

A. That must have been quite early.

Q. Approximately?

A. It must have been quite early in the morning.

Q. Ten o'clock or earlier?

A. Oh, I should say before that.

Q. Before that?

A. Yes.

Q. Nine o'clock or earlier than that?

A. It is difficult to say when it was. It was—I remember I telephoned to Gomes for my carriage, as soon as I got through my breakfast, McWayne's, as soon as we got through I started down and met Nahale coming up. Nahale had gotten further towards Mc-

Wayne's than half way. Of course we had to turn around and go back to get to this lane; so either he was early or I was behind-hand; I don't know which; anyway he met me and we turned back together.

Q. Gomes, he was your hackdriver?

A. Yes.

Q. And his hackstand, the house where he lived and kept his hacks is some miles from McWayne's, isn't it?

A. It is on the junction of the main road and the road coming up from Kailua.

Q. And how far is that from McWayne's?

A. That must be three or four miles, I should think, perhaps a little further.

Q. I didn't get your answer.

A. Three or four miles, possibly a little further.

Q. Yes. Now as you drove along in the hack you met
858 Nahale. How far from McWayne's was it that you met Nahale? You were driving then, were you, towards the junction of the government road that leads up from Kailua and the government road that runs along mauka, the mauka government road?

A. Well, towards the one that comes up on the south, the south road coming up.

Q. The south road?

A. Yes; there are two roads coming up from Kailua.

Q. Yes, one strikes in how close, the south road?

A. Strikes very much closer to McWayne's than the other.

Q. How close is that to McWayne's?

A. That is a short distance.

Q. Quite a short distance?

A. Yes, half a mile, perhaps.

Q. And then you met Nahale quite close to McWayne's?

A. Well, it was on,—he had gotten more than half way. I should think, between the junction of the main Holualoa road and the road coming up from Kailua. Of course we had to go back to find this trail.

Q. Well, in going down to the mill, you and Nahale didn't pass by the postoffice, did you?

A. I don't think so.

Q. You say that at this time your firm was in negotiation with the Kapiolani Estate for the sale of this property?

(Objected to as irrelevant, immaterial and incompetent and having no bearing on any issue in this case and not cross examination.)

The COURT: Well, you say you understood the witness has so testified?

Mr. CATHCART: He has so testified.

Mr. ROBERTSON: I don't so understand it.

859 The COURT:

Q. And have you so testified, Mr. Cooper?

A. I think I testified and the answer was stricken out as not being responsive to the question.

(Question withdrawn.)

Mr. CATHCART:

Q. At or about this time your firm was in negotiation with the Kapiolani Estate, were you not, for the sale of this property?

A. Yes.

(Mr. Cathcart hands document to opposite counsel.)

Mr. ROBERTSON: This is a document that they gave us notice to produce yesterday. It seems that they have had it in their own pocket all the time.

Mr. CATHCART:

Q. I hand you this document and ask you to examine it.

Mr. PROUTY: I think that before any examination or use is made of the instrument handed to the witness that we are entitled to know just how and by whom it is produced.

The COURT: If it is the same instrument perhaps an explanation might be called for. Is this the same document, Mr. Cathcart?

Mr. CATHCART: Yes, this is the same document, your Honor. It is only part of the transaction.

(Argument.)

Mr. WITHINGTON: In the demand we specified another instrument which we didn't have any original of and which we particularly wanted.

The COURT: Very well, if you had this in your possession of course there should have been an exception in favor of this one. Proceed Mr. Cathcart.

860 Mr. CATHCART:

Q. You have examined the paper, have you, Mr. Cooper?

A. I have.

Q. Is this not the written option evidencing the dealings that you had in reference to the sale of this property with the Kapiolani Estate?

A. It is.

Mr. CATHCART: We offer it in evidence and ask it be marked Defendant's Exhibit 11.

(Objected to as not material or competent. Objection overruled; exception.)

Q. I hand you a letter dated April 19th 1904 purporting to be signed by Kinney, McClanahan & Cooper, by McClanahan, and ask you if you have ever seen that before?

A. Not quite sure that I have seen the document, but I knew of the transaction.

Q. Is that the signature of your firm, of E. B. McClanahan?

A. It is.

(Offered in evidence and received without objection. Defendant's Exhibit 12.)

Q. Your firm at this same time were dealing with Alexander & Baldwin in reference to a sale of this same railroad property, were you not?

A. Yes sir.

Q. I hand you this document, which purports to be a copy of a letter addressed to your firm, and ask you if you have the original of that in your possession, possession of your firm?

A. I have none of the files of Kinney, McClanahan & Cooper.

Q. None of the files?

A. No.

861 Q. Can you from examination of the document that I have handed you, the letter handed you, state whether or not such a letter was received by your firm?

A. Letter to this effect was received by our firm, yes.

Q. You can't say whether or not that is a copy of the letter that was received by your firm?

A. No, I can't say, sir.

Q. When you retired from the firm with whom were all the files and papers relative to this case and to the dealings with Alexander & Baldwin left?

A. With the remaining members of the firm. I believe I made a mistake in the date, Mr. Cathcart, this morning. I think I went out on the first of May 1906 instead of 1905.

Q. One year later?

A. Yes.

Q. And the remaining members of the firm were Mr. Kinney and McClanahan and Derby, were they?

A. Yes sir.

Q. As a matter of fact there was an option given to Alexander & Baldwin, was there not, by your firm for the purchase of this material?

(Objected to by plaintiff as irrelevant, incompetent and immaterial, and not proper cross examination.)

The COURT: Objection overruled.

Mr. ROBERTSON: Not the best evidence, your Honor, either.

A. Yes, we gave several options to different parties, among them Alexander & Baldwin.

Mr. ROBERTSON: Move to strike that out on the ground it is not proper cross examination and not the best evidence.

(Motion denied; exception by plaintiff.)

862 Mr. CATHCART: We would now, if the court please, call upon counsel for the plaintiff in this case to produce any writings that they may have relative to this transaction between Kinney, McClanahan & Cooper, on behalf of W. W. Bierce Ltd., and Alexander & Baldwin.

Mr. ROBERTSON: We haven't any, your Honor.

The COURT: You haven't any, Mr. Cathcart?

Mr. ROBERTSON: Our search yesterday included—

Mr. CATHCART: No, your Honor, we have none.

In order to have our demand in sufficient shape, if the court please, we ask the counsel for the plaintiff to produce the option that was given by Kinney, McClanahan & Cooper to Alexander & Baldwin, to which the witness has referred, or a copy thereof; also all letters received by Kinney, McClanahan & Cooper as attorneys for W. W. Bierce, Ltd., from Alexander & Baldwin, relating to that option; also all copies of any letters from Kinney, McClanahan & Cooper to Alexander & Baldwin, Ltd. relating to that option; the same having been written during the months of March and April 1904.

Q. You didn't participate in the trial of the replevin action you say?

A. No sir.

Q. And did you handle this sales end, so called, these negotiations for sale, or was that handled by Mr. McClanahan and Mr. Derby?

A. I think by Mr. Derby entirely; he may have been prompted in his action by McClanahan, but he was the man who did the negotiating.

Q. And you handled the execution end of it, is that the idea?

A. Yes, I was called in as a spare man; at that time the others were busy.

863 Q. Others were busy and you were the available man, eh?

A. Yes.

Q. There was no objection, was there, Mr. Cooper, on the part of young Mr. Colburn to your going on the land down there where the mill premises were situated—where the mill was situate?

A. No.

Q. You had free and full access?

A. Yes.

Q. Before going down there did you have any—Of course you were aware that Mr. Robert Colburn was on the land down there, were you not?

A. No, I don't know that I did know that he was; I don't recall that I had any previous knowledge of his being there.

Q. Were you aware that the Kapiolani Estate had some representative there?

A. No, I don't even recall that to mind.

Q. You were aware, were you not, that the Kapiolani Estate had at that time released and waived all its claim in this property to the W. W. Bierce, Ltd.?

(Objected to as calling for a conclusion of the witness and assuming the existence of facts not proven. Objection overruled; exception by plaintiff. Also objected to as not proper cross examination.)

A. You mean, Mr. Cathcart, by Released, by a formal document in writing or—

Q. Yes—

A. —how?

Q. By a formal document in writing.

Mr. ROBERTSON: Same objection, if the court please, on the

864 ground that that document would be the best evidence of its contents.

(Objection sustained.)

Mr. CATHCART:

Q. Were you aware of any—Isn't it a matter of fact, Mr. Cooper, that the Kapiolani Estate had—Isn't it a matter of fact that at that time the Kapiolani Estate had executed a document, a written document, in favor of the W. W. Bierce company in reference to any claims that the Kapiolani company had on this property?

(Objected to on the same grounds. Objection sustained.)

Q. Isn't it a fact that the Kapiolani Estate had executed at that time a document, a written document?

(Objected to as irrelevant and immaterial and not proper cross examination. Objection sustained; exception by defendants.)

Q. Were there any dealings with the Kapiolani Estate by your firm relative to this property there outside of the option which has been introduced in evidence?

A. Yes, I think there were.

Mr. PROUTY: I move to strike out the answer, if your Honor please, as a conclusion and not a statement of knowledge of the witness.

(Motion denied; exception by plaintiff.)

Mr. CATHCART:

Q. I hand you a document and ask you to look over it, if you please. Have you ever seen the original of that, Mr. Cooper?

A. Yes sir.

Q. Eh?

A. I think so.

Q. And when you saw it was it in the possession of your firm?

865 A. I think it was drawn in our office.

Q. Drawn in your office?

A. I think so.

Q. And you saw it when it was drawn? You think it was drawn in your office?

A. Yes.

Q. Now when did you see it after that?

A. I don't know that I could place the time exactly; I think it was before I went to Kailua, though.

Q. After its execution?

A. I am not quite sure that it was ever executed.

Mr. ROBERTSON: We object to that question, if the court please, on the ground that it assumes a fact not in evidence.

The COURT: Objection sustained.

Mr. ROBERTSON: Was there any answer?

The WITNESS: I said I didn't think it was ever executed.

Mr CATHCART:

Q. You don't think it was ever executed?

A. No.

Q. It is not now in your possession, is it?

A. Certainly not.

Q. And it was one of the papers that was left in the possession of the other members of the firm when you retired, was it?

A. Yes.

Mr. CATHCART: We call on counsel for the plaintiff to produce the instrument of which this is a copy, being dated April 14th 1904. Purporting to be a release from the Kapiolani Estate, Ltd., by its President and Treasurer, to William W. Bierce, Ltd., of the property described in the complaint in the replevin—in the action 866 of William W. Bierce, Ltd.—

Mr. PROUTY: I object to counsel reading it.

Mr. CATHCART: —versus Clinton J. Hutchins, Trustee.

The COURT: The jury will disregard it.

Mr. CATHCART:

Q. The old letter-books of the firm of Kinney, McClanahan & Cooper are now in the possession of Mr. Kinney, are they, Mr. Cooper?

A. I think so.

Q. And the files of letters received are now in his possession, are they?

A. That I am not quite sure of.

Q. Not quite sure of it?

A. I have seen the letter-book but I haven't seen the files.

Q. You are sure, Mr. Cooper, that you didn't come into the mill premises on that Monday about which we have been speaking by the south boundary, through there, you and Nahale?

A. I don't like to speak about points of the compass. I remember of coming in on the side where they had built up their aerating staging for the water coming down through the—It was to pump the water up to the top of this staging to drop down through a grating to cool and purify, and coming down—and I remember I came in right behind where that structure was; it was on the mauka Waimea corner.

Q. You didn't come in by the way in which you left?

A. No sir.

Q. Now did you at any time after you visited the mill leave the grounds of where the mill was situated and return to the grounds by the way in which you finally left the premises?

867 —. I certainly have no recollection of doing so.

Q. Did you see Mr. Conant on the grounds towards where the mill was, towards the mill, or only in the neighborhood of the fence or gate where you left the premises?

A. If my recollection serves me I saw Mr. Conant—possibly saw him slightly before I saw Mr. Scott, but my recollection is not very distinct about that, as to just how long or exactly where he was.

Q. You can't remember?

A. No.

Q. In making your demand on Robert Colburn down there did you specify to him what the material was that you wanted?

A. You mean item by item.

Q. No, not fully, but how did you do it? Explain just how you did it. I don't suppose you would enumerate the spikes or anything of that character.

A. Oh, I think I simply asked him for the right to take the Bierce property,—some general term.

Q. Some general term?

A. Yes.

Q. You didn't specify the rolling-stock as distinct from the tracks?

A. I don't think so.

Q. And he didn't tell you that you were at liberty to remove all the rolling-stock and scales, did he?

A. I think he said something about "You might try to roll the engine," something of that kind; some remark of that kind.

Q. Then he didn't make any objection to your taking off the rolling-stock?

A. Well, he spoke in that way. I don't—I don't remember
868 it as being a permission to take the stock off the property, off the premises.

Q. Well, was it a refusal to let you take off the rolling-stock?

A. I understood his—the result of his conversation would mean a refusal to let me take the property.

Q. Can you remember anything further than the impression that it left on your mind?

A. I think he might have said "Well, you might try and roll the stock off, engines off and cars off"; he may have said that.

The COURT:

Q. Why didn't you try?

A. Well, the track was up.

Mr. CATHCART:

Q. You didn't make any further attempt at all in the matter, as I understand it?

A. No, I made no attempt.

Redirect examination.

Mr. ROBERTSON:

Q. I am referring to Defendant's Exhibit 11. I see by this option, Mr. Cooper, that it is dated the 14th of April. The option was given for thirty days. I will ask you whether pursuant to this option the Bierce company sold, or the Kapiolani Estate purchased, the property enumerated in the option?

A. The option never was carried out.

869 Q. Option never carried out?

A. No.

Q. Simply expired and nothing further done?

A. That's all.

Q. Well, at any rate the option expired and there was no purchase or sale made under it?

A. No sale made.

Q. And that was true of the Alexander & Baldwin option?

A. Yes.

Q. And no delivery of the property was made under either of those options to anybody?

A. No.

Q. I think you said, Mr. Cooper, in one of your answers, that you gave options to several?

A. Yes.

Q. People. Is your statement that you just made that there was no purchase or delivery made under these two that have been mentioned also true as to any others that were given?

A. Yes sir.

Q. On either the Saturday or Monday that you have referred to as being in North Kona did you see a letter received by Deputy Sheriff Nahale from John D. Paris?

A. I did.

Q. You have also stated that you telephoned to Paris?

A. Yes.

Q. What was it you telephoned to Paris about?

Mr. CATHCART: We object to that as incompetent, irrelevant and immaterial, not proper redirect examination.

(Objection sustained; exception by plaintiff.)

870 Mr. ROBERTSON:

Q. Do you know who that policeman was that accompanied Nahale?

A. I don't recall his name.

Q. Honolulu policeman or Kona policeman?

A. O no, one of his own——

Q. Kona officer?

A. —deputies. Yes.

Q. You said that when you were in Kona in November 1903 you had no difficulty in getting along the track. Did that remark have reference to the mile or mile and a half track that you said you went over?

A. That's all.

Q. Not to rest *the* of it?

A. No.

Mr. ROBERTSON: That's all.

Mr. CATHCART: That's all.

871 Mr. ROBERTSON: We offer in evidence, if the court please, a certified copy of a deed from C. J. Hutchins, trustee, to the Henry Waterhouse Trust Co. Ltd.

The COURT: What is the date of the deed?

Mr. ROBERTSON: 13th of June, 1903.

Mr. CATHCART: We object to it, if the court please, as being

incompetent, irrelevant and immaterial. It is not in any way rebuttal, if the court please; not material to the issues in the case.

(Argument.)

The COURT: If this is not the same as Mr. Scott testified it will be rebuttal; therefore it will be admitted.

Mr. CATHCART: Exception.

(Exhibit "NN.")

Mr. ROBERTSON: This purports to be a deed of trust, dated the 13th of June, 1903, between Clinton J. Hutchins, Trustee, of the first part, Henry Waterhouse Trust Co. Ltd., of the second part. In consideration of ten dollars in hand paid and the agreement of the party of the second part, of the trust company, to advance \$12,250, and for that consideration Hutchins conveys all and singular those certain goods, chattels and effects, real and mixed property conveyed to him by deed of F. L. Dortch, receiver of the Kona Sugar Co., etc.

Mr. WITHINGTON: Mr. Robertson, the record seems to show that this was stricken out by your motion, reference by Mr. Scott to the trust deed.

Mr. ROBERTSON: Only one part of it.

Mr. WITHINGTON: Had to strike out everything in regard to the trust deed.

(Recess until tomorrow morning.)

872 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

W. W. BIERCE, LTD., Plaintiff,

vs.

WILLIAM WATERHOUSE et al.

MAY 20TH, 1908

The COURT: I wish to call to counsel's attention that Judge Cooper has come to me this morning and said that there were some matters that he testified to yesterday that he would like to clear up, wanted to make it clearer than he did make it, after having thought it over. I understand that he has not spoken to counsel on either side; counsel on neither side knew anything of his desire to take the stand. Any objection?

Mr. CATHCART: No objection on the part of the defendants.

Mr. ROBERTSON: No objection.

The COURT: Very well, Judge Cooper.

873 Direct examination of HENRY E. COOPER, recalled:

The point which I wish to speak of is the question put to me by Mr. Cathcart last night if I remembered anything said to Mr. Scott that I would not receive the property under those conditions. I think my answer was that—that no such conversation occurred. It has bothered me a good deal and I thought of it very much last night; and I believe I did say that, but to what question and on

what conditions it was said I am not quite sure, but I remember of saying to Mr. Scott now that I would not accept the property under those conditions. That is the point that I wished to—because I want to be very particular in this case not to have anything go wrong by reason of any lapse of memory on my part. That is the point that—

The COURT: There was another point that Judge Cooper brought to my attention, that neither side asked him concerning, which strikes me as having something to do with the case.

The WITNESS: My point is, that where a witness is asked to tell the whole truth, how shall he tell it if he is not asked about it? I have not suggested to either counsel what the situation is, but I don't like to have things left in the air, so to speak.

Mr. ROBERTSON:

Q. Well, as I understand it, Mr. Cooper, the conditions that you referred to in your conversation with Mr. Scott were the conditions that you found existing there when you went up there?

A. Probably so, but I don't remember what he said or what tender he made or what brought about my reply, but I do remember now—after Mr. Cathcart repeated the language it bothered me a great deal, yesterday afternoon and last night, and I remember now that I did use language to that effect to Mr. Scott.

Q. By this statement you make this morning you do not intend to qualify the statement you gave yesterday as to Scott's refusal to help you get the property?

A. My answer to that is that my general statements are correct; I am satisfied of that, because I have refreshed my memory before coming onto the stand by looking at a report that I made to Mr. Bierce the day after I returned, and also from a conversation that I had with Mr. Hutchins on the street the same day that I returned, so I say that my general statements are correct—

Q. That is—

A. —I am sure.

Q. By general statements you mean your general statements in regard to the inability to get the property?

A. Yes sir.

Mr. ROBERTSON: That's all.

Mr. CATHCART:

Q. You don't remember the exact language in which you refused to accept the property?

A. Why, the language that you used rings in my ears as being probably the statement that I did make, that I refused to accept the property under those conditions.

Q. Well, the language that I used was, "Mr. Sheriff, I decline to receive the property. It is not the property of Scott, Hutchins or anyone else."

A. I don't remember that language. What I am referring to is that I remember the incident now that I did refuse to

accept the property as apparently tendered. My recollection of the exact words is no more particular in this case than it has been in my other testimony.

Q. That refusal of yours, in whatever language couched, was made to Scott at the time you were all out there—you were there on the mill property on Monday morning?

A. Yes.

Q. And in response to something that he had said to you?

A. Yes.

Q. But your memory is no fresher now as to what he said than it was yesterday?

A. No, as to the exact words I could not say.

Q. In thinking over this whole matter since yesterday, Judge, have you refreshed your memory at all as to the execution of that instrument which I showed to you, purporting to be a release?

A. No.

Q. You have not?

A. No.

Q. I would ask you if you wouldn't look over the correspondence and see if you can refresh your memory?

A. I am not quite sure that I can have access to it.

Q. Eh?

A. I am not quite sure that I would have access to it.

Q. To the correspondence?

A. Yes.

Q. Well, I think that you can. It must be either in Mr. Kinney's hands or the hands of the plaintiff.

876 A. You mean as to the execution of the release by the Kapiolani Estate?

Q. Yes; see if you can refresh your memory.

A. I don't believe that would be a matter of correspondence at all.

Q. Well, you look it up and see. Possibly it might; I don't say it would.

Mr. CATHCART: At this time, if the court please, we ask the counsel for the plaintiff to produce the letter-books of Kinney, McClanahan & Cooper covering the period of time between March and April of 1904, March, April and May, 1904, and also the letter files of Kinney, McClanahan & Cooper covering that period of time of letters received by Kinney, McClanahan & Cooper, and also all correspondence, either from Kinney, McClanahan & Cooper or any one of them with the plaintiff, William W. Bierce, Ltd., and also all correspondence from William W. Bierce, Ltd., to Kinney, McClanahan & Cooper or any one of the firm during that period of time, including cablegrams.

Now, if the court please, the court has mentioned that there was another point which the witness called the court's attention to. The defendants have no objection to that statement being made, if the court please, of course reserving all our rights to object to it if it is immaterial or incompetent or anything like that.

The WITNESS: Well, I mentioned the first of it, that—the state-

ment that, or conversation, that I had with Mr. Hutchins on the street the day after I came home, in which he laughed at the—what he called the “performance” I had gone through up there, attempting to take possession of the property, and I said
877 “Well, your man Scott was the principal blockader at the time,” and he said “Never mind the—Scott; he had no authority to act for me; if he acted at all he acted on his own behalf.” That is what I wanted to refer to, as clearing up the situation from my standpoint.

Mr. CATHCART: I believe that’s all.

Mr. ROBERTSON:

Q. You told Hutchins you were unable to get the property?

A. Yes.

Q. Just one other question. In the question that Mr. Cathcart put to you in examining you just now, he said “when you were all on the mill premises,” and you said yes, but you didn’t mean by that to convey the impression that Scott ever got onto the mill premises?

A. No.

Mr. CATHCART: No, I didn’t mean that; I merely called his attention to where the conversation took place.

Q. That conversation you had with Hutchins took place after your return, eh?

A. Yes.

Q. Mr. Hutchins at that time stated, did he not, that he was willing that everything should be turned over?

A. I know he had stated that on previous occasions, but I don’t know that he did—

Q. He had?

A. He made a tender in writing.

Q. As a matter of fact, Judge, you know that the position of Mr. Hutchins here was to turn over all that property to you? Don’t you know.

A. I remember he made the written tender.

Q. You remember that he made statements too, don’t you?

A. Yes, I think so.

878 Q. Eh?

A. I think so.

Q. Now isn’t it a fact, Judge, that when you went up there that time to get the property that you were not after the property; the idea was not to secure the property for the Bierce people; and isn’t it a fact that the Bierce Company at that time didn’t want the property?

Mr. ROBERTSON: Objected to as irrelevant and immaterial.

The COURT: Objection overruled.

A. No, that is not the condition, Mr. Cathcart. I went up there for the purpose of making a genuine effort to get that property; that is to say, if I could do so without any interference by anyone;

I felt that we must necessarily do that; but there had been a change in policy with our clients——

Q. What was that?

A. Well, the first was——

Mr. PROUTY: We object to confidential disclosures between counsel and client.

(Argument.)

Mr. PROUTY: The question calls for a confidential communication between attorney and client and which is privileged under the law.

The COURT: I was thinking perhaps you based your objection on some other grounds, and if so——

Mr. PROUTY: We do base it upon the ground that it is not proper redirect examination.

The record contains, as I understand it, the partial answer of the witness, to the effect that there has been a change of policy with our client. I move to strike that out, in answer to the last preceding question, as unresponsive, and also as tending to show a privileged communication between attorney and client.

879 (Last question and answer read.)

Mr. PROUTY: It also states a conclusion, an additional reason why it should be stricken out.

(Motion to strike denied; exception by plaintiff.)

The COURT: The question then is confined to the single point as to what this policy is, is that the question?

Mr. CATHCART: That is the question there.

The COURT: The court understanding that the question is for the purpose of bringing forth privileged communication or what is done from the privileged communications between attorney and client, the objection will be sustained.

Mr. CATHCART: Exception.

Q. As a matter of fact, Mr. Cooper, you didn't make any particular endeavor to secure possession of that property when you went down there, did you?

(Objected to as having been asked and answered. Objection overruled; exception by plaintiff.)

A. I would answer that in this way, Mr. Cathcart: I went prepared to get that property; if I had found no objection or obstruction in the way I should have taken it; I went with sufficient funds to have accomplished the situation.

Q. But the idea was that if there was the slightest pretext for refusing to take it you were to take advantage of that pretext; was that not the case; is that not so?

Mr. ROBERTSON: We submit that does not call for a statement of fact.

(Objection overruled; exception by plaintiff.)

A. Well, it gets dangerously near the forbidden ground, Mr. Cathcart, in answering that question.

Mr. CATHCART: Well, you answer that unless you hear some objection.

880 A. I want to be fair to both sides; I don't want to start a question and get before the jury a situation that isn't the correct one according to the court's ruling.

Mr. ROBERTSON: We have a right to call the witness' attention to the fact that he has no right to make any such statement.

Mr. PROUTY: The court has no right to compel the disclosure of a privileged communication.

The COURT:

Q. I suppose that calls for your purpose down there, Judge Cooper,—what was your purpose? and does not call, as I understand it, for any disclosure of any communication between yourself and client.

Mr. ROBERTSON: On that understanding we object to the question on the ground that it has already been asked and answered.

(Objection overruled; exception by plaintiff.)

A. The reason that I went myself instead of sending the execution to the sheriff was that I considered that we were laying the foundation for complying with the change of policy dictated by our clients—

Mr. PROUTY: I move to strike the answer as stating a privileged communication between attorney and client.

(Motion denied; exception by pl'ff.)

Mr. PROUTY: And also as unresponsive to the question.

(Motion denied; exception by pl'ff.)

Mr. CATHCART:

Q. And that was to lay the foundation of bringing—of getting the money on the bond and not getting the property, isn't that it,

Mr. Cooper; isn't that the fact?

881 (Objected to by plaintiff as calling for confidential communication between attorney and client. Objection overruled; exception by pl'ff.)

A. Well, I think I have answered that, Mr. Cathcart, that it was—

Q. Well, you merely said it was laying the foundation.

The WITNESS: I will ask the court if I am now to answer as to what the policy was as dictated by our client? I cannot answer this question now unless I say what the policy was.

The COURT: Of course you are not permitted to disclose any privileged communications between yourself and client.

A. I can't answer this question without doing so.

Mr. PROUTY: I move to strike out all the testimony of the witness with reference to policy or any other matter which he has stated were dictated by his client, William W. Bierce, Ltd., as stating a privileged communication between attorney and client.

The COURT: He has not stated what it was.

(Argument.)

The COURT: Well, the court will not require Judge Cooper to answer any question that discloses any communication between Bierce and company and himself or his firm, a member of the firm, in regard to the matter.

Mr. ROBERTSON: I understand the objection to the question is sustained?

The COURT: Yes.

Mr. PROUTY: Now then we ask for a ruling on our motion to strike. It seems to us to be involved. We moved to strike the statement in reference to the policy dictated by the client, as stating a privileged communication and also stating a conclusion.

882 The COURT: I am inclined to think that the motion should be granted. As it stands there of course there is nothing particularly disclosed; it seems to serve as the basis for something to follow which cannot follow in the eyes of the law, therefore the motion will be granted; that portion of the answer in regard to the policy will be stricken out. The jury will disregard it in this matter.

Mr. LEWIS: We note an exception.

Mr. CATHCART:

Q. You were desirous of getting hold of this property during the period of time, or at the times that your firm gave these options, were you not?

(Objected to as irrelevant and immaterial and not calling for any statement of fact. Objection overruled; exception by plaintiff.)

A. Yes, we were continually endeavoring to get possession of the property.

Q. And when you found that none of these options went through you no longer cared to get the property but you wanted to lay a foundation so as to proceed against the bond, is that not true?

(Objected to as irrelevant, immaterial, incompetent, not calling for any statement of fact. Objection overruled; exception.)

A. No, it was not the situation at all.

Q. Well, what was the situation, then?

A. We continued to work for the purpose of obtaining possession of the property up to the time that I have testified to.

Mr. PROUTY:

Q. When the execution was returned?

883 A. Up to the time there came the idea, the change of policy.

Mr. CATHCART:

Q. Do you want us to understand up to the time of the change of policy?

A. Yes.

Mr. ROBERTSON: Move to strike out in reference to the change of policy, your Honor.

The COURT: That will be stricken out and the jury will not consider it.

Mr. CATHCART:

Q. Well then, for a moment leave out the words "change of policy" and tell us when you did not become desirous of getting the property?

(Objected to; objection overruled.)

A. There was no time, Mr. Cathcart; if I could have got that property at any time so long as I was in charge of the case I would have gotten it, taken it, provided I could have gotten it in the way which I have testified, if there had been no objection or obstruction on the part of any persons making claims against it which would have brought me into the question of either using force or doing other than taking a peaceable possession of it, I should have taken it.

Q. Isn't it a matter of fact, Mr. Cooper, that the plaintiff in this section, William W. Bierce, Ltd., while they thought they could sell that property, were desirous of getting it, and after they found they couldn't make a sale of the property, that they didn't want the property but they wanted to proceed against the bond; isn't that so?

Mr. PROUTY: I want to be heard in objection to this rehash of this testimony.

(Objection overruled. Question read.)

884 Mr. PROUTY: I object to that because that tends to call for confidential communications.

(Objection overruled; exception by plaintiff.)

A. I don't see how I can answer that question, Judge De Bolt, without stating the substance of our instructions from our client.

The COURT: As I understand, it calls for merely the intention.

Mr. PROUTY: I object to that. The intention could only be shown by communications, and they have no right to the communication and they therefore have no right to the intention, not in that manner.

The COURT: Well, of course if you can't answer the question, Judge Cooper, without disclosing communications between yourself—I understand you to say you are unable to answer?

A. In my opinion I could not answer the question in its entirety without disclosing the relations that existed prior to my going on my first trip to Kona and at the time that I went at this time, because we were acting under instructions pure and simple from our clients.

The COURT: That being the case then, the objection — sustained.

Mr. CATHCART: And exception, if the court please.

We offer to show by this witness, if the court please, that——

Mr. PROUTY: Object to the statement of the offer in the presence of the jury.

The COURT: We will take a recess of five minutes, gentlemen. (To the jury.) I will hear the offer in the absence of the jury.

Mr. CATHCART: It shows of record, if the court please, that 885 the jury is excused at the request of counsel for the plaintiff?

The COURT: Very well. Make your offer.

Mr. CATHCART: We offer by this witness, if the court please, to show that the plaintiff, William W. Bierce, Ltd., were endeavoring to sell this property, the property in question; that when the negotiations were first commenced looking to the sale of this property to the various parties to whom options were given the plaintiff desired possession of the property, and in their negotiations treated the property as within their possession; that W. W. Bierce, the president, or some officer of the plaintiff corporation negotiated some of these options himself; that subsequent thereto the plaintiff changed its attitude in reference to the matter, not being able to put through these sales which they were negotiating, and that then their endeavor was to avoid taking the property so as to pursue the remedy on the bond for the money value of the judgment obtained; and that that policy as I have outlined it guided the plaintiff from the time of the securing of the judgment in the replevin suit up to and including the period when the witness, as their attorney, went to Kona on that trip he has stated in his testimony; and we also offer to show by this witness that after the return of W. W. Bierce to the mainland, and either in the latter part of March or in April of 1904, that the attorneys for the plaintiff here were instructed by the plaintiff not to take the property but to proceed against the bond on the judgment value—on the judgment for the money claimed. That is our offer, if the court please.

Mr. PROUTY: We object to the offer, if your Honor please. 886 as incompetent, irrelevant and immaterial.

The COURT: Let the jury come in, Mr. Bailiff. As I understand you propose to show this by communications between the plaintiff and their then attorneys?

Mr. CATHCART: If the court please, every question that I have asked the judge that led up to this he has declined to answer on the ground that he couldn't answer without disclosing communications. Now that is all we know. I don't know.

The COURT:

Q. As I understand you, Judge Cooper, you couldn't answer the question laid in the offer without disclosing communications between yourself and clients?

A. I certainly could not cover the entire offer without doing so.

(Objection to offer sustained. Exception by defendants.)

(Here the witness is excused in order that he may refresh his memory by looking over the letter-books of Kinney, McClanahan & Cooper as to whether or not the Kapiolani Estate release was executed.)

Direct examination of J. A. THOMPSON, recalled.

Mr. PROUTY:

Q. Mr. Thompson, you have been on the stand before in this case?

A. Yes sir.

Q. I show you a motion and order modifying decision,
887 both filed May 6th, 1905, in the replevin suit of William W. Bierce, Ltd., vs. Clinton J. Hutchins, Trustee, in the Supreme Court of the Territory of Hawaii, and ask you if they are portions of the original record of the Supreme Court in that cause?

A. They are the originals that belong to that file, showing the filing mark of the Clerk as of that date, May 6th 1905.

Q. Yes, and the order is an order that was actually made by the Court in that cause?

A. Signed by the Clerk "By the Court, Geo. Lucas, Clerk."

Q. Yes.

Mr. PROUTY: I would like to offer these in evidence, and they may be considered read, as far as we are concerned, if it is agreeable to counsel.

Mr. CATHCART: We object to it as incompetent, irrelevant and immaterial, if the court please, and not proper rebuttal.

(Objection sustained; exception by plaintiff. Offered for identification as "20.")

Mr. PROUTY:

Q. Mr. Thompson, will you examine the purported affidavit of A. B. Wood, which I show you, entitled in the replevin suit of Wm. W. Bierce, Ltd., against Clinton Hutchins, file mark, file date being August first, 1903, and state if that was one of the original documents in that case which was transferred from the Clerk's office of the Circuit Court of the Third Circuit to the Clerk's Office of the Circuit Court of the First Circuit of the Territory of Hawaii?

A. It is entitled in the third circuit, filed—by the Clerk.

Q. Well, where is it now on file?

A. It is now on file as part of the records in the Circuit
888 Court of the First Circuit.

Q. Yes, and it is the original paper that came over with the files is it?

A. The file mark of the clerk being on it and—I take it to be the original of that document.

Q. I notice that the complaint in the replevin suit, previously referred to in your testimony, the affidavit in replevin, the order for the seizure of the property and the sheriff's return, and the affidavit last referred to in your testimony, the answer of the defendants in the replevin suit, are attached together; that is true, is it not?

A. They are—they are under the same cover, wrapped together.

Q. Well, they are attached together, aren't they?

A. Yes sir.

Q. Were they attached together when they were transferred from

the Clerk's office of the Third Circuit Court to your office, if you know?

A. I don't know.

Q. No recollection or knowledge on that subject?

A. No sir.

Q. Did you have anything to do with their being transferred from the Clerk's office of the Third Circuit?

A. I did not.

Q. To the Clerk's office of the First Circuit?

A. No sir.

Q. You didn't have anything to do with that?

A. No sir, my best recollection I did not; that is a matter concerning the Chief Clerk of the Department with the Clerk on the other circuits. From entries there in my writing on the back 889 of the wrapper it appears that I put that together after they got here.

Q. You put them together after they were received here?

A. Or after the case had been disposed of, I think. That is one of our—

Q. After the trial of the case?

A. After the trial of the cause, yes.

Q. And they have remained in that condition ever since, as I understand you?

A. I couldn't swear to that.

Q. Well, have you any knowledge—?

A. Of course as a rule of the office they remain in that condition, yes. I couldn't say; it may have been removed there and taken apart by someone; I couldn't say.

Mr. PROUTY: I offer the affidavit referred to and which the witness has just identified.

Mr. CATHCART: We object to it as incompetent, irrelevant and immaterial, not rebuttal.

(Objection sustained. Exception by plaintiff. Marked "21" for identification.)

Cross-examination of H. E. COOPER resumed.

Mr. CATHCART:

Q. Have you had a chance, Judge, since you left the stand to look over any papers or correspondence or anything so as to refresh your memory as to whether or not that release was executed?

A. I have.

890 Q. Can you state now whether or not it was executed?

A. I found in a letter written by Mr. McClanahan on the 19th of April—

Mr. PROUTY: We object to a statement about it by the witness.

The COURT: I suppose, Mr. Cooper, the question calls merely for, having refreshed your memory—

A. I have refreshed my memory.

Q. —what is your recollection after having refreshed, not what the letter says.

Mr. PROUTY: I object to the question unless the paper used by the witness to refresh his recollection were memoranda made by him at the time of the transaction, or under his direction.

Mr. CATHCART:

Q. Having refreshed your memory what can you say?

A. You mean to say from—Does my memory now go back independently of what I have seen?

The COURT:

Q. Well, if your memory is entirely based upon the writing that you have examined and you have no independent recollection, then of course your testimony would not be admissible, but having refreshed your memory—It assumes that you at one time did have some recollection upon the matter but have forgotten it, and you only refer to the written instrument for the purpose of refreshing your memory. Now having refreshed your memory, as the term itself implies, what is your independent recollection?

A. I have no further recollection than before; that the instrument was lying in our office and was ready for execution.

Q. And then as I understand—

A. I have no recollection of it being executed.

891 Q. As I understand you then your answer is that you are now obliged to testify from what you have read and examined and have no independent recollection?

A. No, nothing further than I have stated before.

Mr. CATHCART:

Q. You said, however, Judge, you thought it had not been executed, so you had some recollection of it then, did you not, when you said you thought it had not been executed?

A. I think in answer to your question when you asked me about the executed copy, or the executed instrument, I thought that it had not been executed, something to that effect.

Q. You volunteered, in making your statements, that you thought it had not been executed?

A. O no, you asked me the direct question. You handed me an unexecuted copy, then you referred to an executed copy. I said I didn't think that the document had been executed.

Q. Then you had some recollection at that time?

A. Oh, I knew about the transaction, yes.

Q. Well, when you say you thought it had never been executed, when you said that you had no recollection at all on the subject, is that the idea?

A. No, I should say that my impression was that it had not been executed, if I had any recollection at all. I remember that we had negotiations with the Kapiolani Estate for the sale of this property and also for securing a release of their interests in a portion of the property that they claimed, and when you showed me

the unexecuted document or copy I recognized that as having been drawn in our office, and my recollection is you asked me if it had not been executed, or some reference to an executed document.

892 Mr. PROUTY:

Q. Do you know as a matter of fact that those negotiations were abortive?

(Objected to; sustained.)

Mr. CATHCART:

Q. You have no recollection whatever; either one way or the other, as to whether that instrument was ever executed?

A. Well, my impression is that it was not executed.

Q. Is that your present recollection?

A. I don't see how I can answer that now without—If you mean my recollection, my recollection independent of what I have seen, yes, that is my impression, that it was not executed.

Q. Would what you have seen down there change your recollection in any way?

A. No, not as to my individual knowledge of it.

Q. So that notwithstanding what you have seen you are still under the impression that it was never executed, is that the idea?

A. If you are speaking of my recollection, yes, that is correct.

Q. And your impression still remains the same?

A. Yes, because I had nothing to do with that part of it. There is no reason why I should know. I remember the document laid in the office for a number of days after it was drawn, without being executed; I know that that is my recollection.

Q. And you have a sufficient recollection for that?

A. Yes.

Q. You had enough to do with it to remember that?

A. Well—Oh, I was connected with the whole transaction.

893 Q. I thought you said a moment ago that you didn't have anything to do with it?

A. O yes, I had to do with the negotiations, and to do with the drawing of the document, but so far as any possible execution of the document—

Q. You remember the drawing, of course?

A. Yes.

Q. You remember it laid in your office for some time?

A. Yes.

Q. And there your recollection chops off?

A. Yes.

Q. Ends there?

A. Yes.

Q. Now isn't it a matter of fact that you proceeded in your dealings with the Kapiolani Estate and with others upon this document as having been executed?

A. No, I don't think so.

Q. You did not?

A. No, I don't think so.

Q. You are not sure?

A. No—I don't think I did; I have no recollection.

Q. You had talks with other people, dealings with this property?

A. Yes.

Q. And is it not a fact that in entering upon dealings with other people in reference to these options you acted upon this instrument as executed, this release?

A. No, I don't think so. I think these other options were given before we had these negotiations with the Kapiolani Estate.

Q. Didn't you deal with the Kapiolani Estate upon the idea that this had been executed, this release.

894 (Objected to as irrelevant and immaterial, having no bearing on any issue in this case. Objection sustained.)

Mr. CATHCART: Exception.

(Here the court adjourns to afternoon session.)

Afternoon Session, May 20th, 1908.

Cross-examination of H. E. COOPER resumed.

Mr. CATHCART: In this matter, if the court please, we have just requested Mr. Cooper to get the letter which he refers to as having seen but which didn't refresh his recollection and he is on his way up here now and will be here in a moment, and we wish to offer that in evidence.

Q. You have the letter-book in which that letter is, Mr. Cooper?

A. Yes sir.

Q. Will you turn to that letter which refreshed your memory.

(Objected to as incompetent, irrelevant and immaterial and requires the witness to refer to confidential communications between attorney and client. Objection overruled; exception by plaintiff.)

The COURT:

Q. Have you that letter?

A. I have.

Mr. CATHCART: I will now make an offer, if the court please, of the letter which counsel has referred to and which tends
895 to prove whether or not the release spoken of has been executed, being a letter dated April—letter-press copy of a letter dated April 19th 1904.

(Objected to on the ground that there is no evidence that the letter was ever sent, and in the second place, if it was sent it was a confidential communication between attorney and client, and in the third place this witness' knowledge and recollection of the alleged release has already been fully covered in the evidence.

The COURT: The objection will be sustained.

Mr. CATHCART: The objection to the offer, to the introduction?

The COURT: Yes.

Mr. CATHCART: And exception, if the court please.
That's all.

Mr. ROBERTSON: No questions.

Plaintiff rests in rebuttal.

896 Direct examination of ROBERT L. COLBURN, called and sworn.

Mr. WITHINGTON:

Q. Mr. Colburn, do you recall a visit by Judge Cooper, who has just been on the stand, to Kona and the mill of the Kona Sugar Co. in May of 1904?

A. Yes sir.

Mr. ROBERTSON: I object to it as not proper surrebuttal.

The COURT: Objection overruled to the present question, anyway. It is preliminary in its nature.

(Exception by pl'ff.)

A. Yes sir.

Mr. WITHINGTON:

Q. Who was with him?

(Same objection, same ground, overruled, exception.)

A. Deputy Sheriff Nahale, A. F. Linder, and Mr. E. E. Conant, and three or four other policemen.

Q. Was there anybody else you recollect there?

(Same objection and ruling.)

A. Mr. Scott was outside of the fence.

(Exception by pl'ff.)

Q. I wish to ask you whether you refused to deliver the railroad material which was claimed by the Bierce Co.?

(Objected to as not surrebuttal and leading. Objection overruled; exception by pl'ff.)

A. Read the question again, please.

(Question read.)

897 A. No sir.

Mr. ROBERTSON: Move to strike that out as a mere conclusion of the witness and not a statement of fact.

(Motion denied, exception by pl'ff.)

Mr. WITHINGTON:

Q. Did he make any demand on you for its delivery?

(Objected to on the ground it is not proper surrebuttal and also that it calls for the conclusion of the witness. Objection overruled, exception by pl'ff.)

A. Sheriff Nahale served me with a writ of execution issue out of

some court, and I stated to him that, as agent of the Kapiolani Estate, why I laid no claim to it, and could take the property.

Mr. ROBERTSON: Move to strike it out on the ground it is not surrebuttal, furthermore it is not responsive to the question.

The COURT: Upon that ground the motion will be granted; it will be stricken out.

Mr. WITHINGTON: Will your Honor allow me to ask a question before it is stricken out?

The COURT: Jury will disregard the answer.

Mr. WITHINGTON:

Q. Was any demand made upon you at this time——

A. By Sheriff Nahale.

Q. —in the presence of—Was that in the presence of Mr. Cooper?

A. Yes sir.

Mr. ROBERTSON: Move to strike it out on the ground it is not surrebuttal.

The COURT: The motion to strike will be granted. The jury will di-regard the answer.

898 Mr. WITHINGTON: I will withdraw the question and put it in a different form.

Q. Was any demand made upon you by Judge Cooper for the delivery of this property?

A. After Sheriff Nahale read the execution to me I stated that he could take the property, other than over the rails on the Kapiolani Estate land.

Mr. ROBERTSON:

Q. Other than over, is that it?

A. Yes.

Mr. ROBERTSON: Move to strike that answer out on the ground it is not responsive to the question.

Mr. WITHINGTON: He has not finished the answer.

A. And Nahale, well, he hesitated for four or five minutes and then he handed the execution over to Mr. Cooper; he says "I can't do anything." Then they went over to where Mr. Scott was standing and asked him—went over and had a talk with Mr. Scott, who was standing outside of the boundary fence.

Mr. ROBERTSON: Move to strike the answer out on the ground it is not responsive.

The COURT: Motion to strike is granted; jury will disregard the answer.

(Question read.)

The COURT: Observe the question: It is whether or not Judge Cooper made any demand on you?

A. No sir.

Mr. WITHINGTON:

Q. Was anything said in *regard to* the presence of Judge Cooper in regard to turning over the property?

899 Mr. ROBERTSON: Objected to as not proper surrebuttal.
(Question withdrawn.)

Mr. WITHINGTON:

Q. Did you say to Judge Cooper that you wouldn't deliver this property?

A. No sir.

Q. What did you do or say, if anything, to Judge Cooper or in his presence with reference to delivering the property?

Mr. ROBERTSON: Objected to as not proper surrebuttal.
(Objection overruled; exception by pl'ff.)

A. As agent for the Kapiolani Estate I laid no claim to the railroad and he could take it away, other than over the rails on the land.

Mr. WITHINGTON:

Q. You mean that was said to Cooper?

A. Said to Nahale in Mr. Cooper's presence.

Mr. ROBERTSON: Move to strike out that answer on the ground it is not surrebuttal; your Honor.

(Motion denied; exception by pl'ff.)

Cross-examination.

Mr. ROBERTSON:

Q. Well, what did you mean by saying that they could—You had reference to the locomotives and cars, didn't you, when you made that statement?

A. All the property which he has given me a list of, what the execution called for.

900 Q. Well, the principal part was the locomotives and cars?

A. Yes sir.

Q. And you stated to Nahale that he could have those locomotives and cars but he couldn't take them over the rails, is that it?

A. Yes sir.

Q. As a matter of fact what was the condition of the rails on each side of where the cars and locomotives were?

A. Had taken——

Mr. WITHINGTON: Object to that on the ground that it is not proper cross-examination.

The COURT: Objection overruled.

Mr. WITHINGTON: Exception.

A. Question again, please?

(Question read.)

A. I had taken up the rails both on the north and south ends of the——

Mr. ROBERTSON:

Q. That is between the point where the locomotives and the cars stood——

A. On the boundary fences.

Q. On the boundary fences on each side you had taken up the rails?

A. Yes sir.

Q. So that the cars or locomotives couldn't be rolled out?

A. Yes sir.

Q. What was the nature of the ground there; was there any embankment or ditches or what was there on each side of the locomotives and cars?

Mr. WITHINGTON: Of course our objection applies to this whole line?

901 The COURT: Certainly; same ruling.

A. Well, one locomotive was in the house, the little locomotive was under the cane carrier near the fill there, about say 10 or 15 feet.

Mr. ROBERTSON:

Q. A fill?

A. Yes, had the rails laid on it.

Q. That is, the rails were laid on a fill?

A. Yes.

Q. How high was that fill above the surrounding land?

A. About 10 or 15 feet in some places.

Q. Well, did that fill extend entirely across this land from fence to fence to fence?

A. Yes, from one boundary fence to the other.

Q. And the land was fenced on both sides?

A. Yes sir.

Q. And the fences across where the track had previously run?

A. Yes.

Q. And after you made that statement to Nahale he turned to Mr. Cooper and said "I can do nothing." is that it?

A. And handed him back the paper he had.

Q. And said, "I can do nothing"?

A. Yes.

Q. Where was Mr. Scott at that time?

A. On the other side of my boundary fence.

Q. Did he get into the premises?

A. He came in once and I drove him out.

Q. How did he get in,—over the fence?

Mr. WITHINGTON: May it please your Honor, this certainly has nothing to do with describing conditions of the property.

902 A. No, I didn't see it.

Mr. ROBERTSON: It is part of the general situation.

Mr. WITHINGTON: I move to strike out that.

(Motion overruled.)

Redirect examination.

Mr. WITHINGTON:

Q. Mr. Colburn, you spoke about some rails being taken up on both the north and south boundary; how many were taken at each boundary?

A. Two on each side.

Q. Two on each side.

A. Two lengths.

The COURT:

Q. You mean two rails on each track or one rail on each track?

A. Two rails.

Q. Two rails on each track.

A. Each track.

Q. On each side.

Mr. WITHINGTON:

Q. That is to say, that would be eight rails or four rails?

A. Four rails.

Q. Two rails at the north end and two rails at the south end?

A. Yes.

Q. Is there a road to this property?

A. Yes sir, government road leads right through it.

Mr. WITHINGTON: That's all.

903 Mr. ROBERTSON:

Q. How far is that road you refer to from where the cars and locomotives were?

A. Some of the cars was 50 or 75 yards away, one little locomotive was right on—right adjoining the road, right next the fence, the boundary fence, and the big locomotive was about 25 or 30 yards away in the house.

Q. Did the boundary fence run across the road?

A. No, right along with the road.

Q. Oh, so that the land was not only fenced on each side boundary but also fenced along the road?

A. Yes.

Q. How old were you at that time?

A. 23.

Mr. ROBERTSON: Skiddoo.

Direct examination of JOHN F. COLBURN, called and sworn.

Mr. WITHINGTON:

Q. Mr. Colburn, I show you this paper, marked "copy, surrender of release W. W. Bierce & Co." I ask you whether you recognize it?

A. I do.

Q. Where did you first see it?

Mr. ROBERTSON: Is that an exhibit in this case?

904 Mr. WITHINGTON: It has been produced here and I thought it had been identified, but there is no mark on it of identification.

Mr. ROBERTSON: We object to the question as irrelevant, immaterial and incompetent, your Honor.

Mr. WITHINGTON: We are endeavoring by this witness to rebut the testimony of Judge Cooper in regard to any difficulty which he had from the Kapiolani Estate in getting possession of this property. We expect to show that the original was last in their hands; this is a typewritten copy, and if we prove the execution why then we will offer it in evidence to rebut—

The COURT: As it now stands, Mr. Withington, the objection should be sustained; it is accordingly sustained.

Mr. WITHINGTON: Then I will ask to have it marked for identification, and I understand it is rejected, not on the ground that execution has not been proved or that it has not been proved that it was last in the hands of the plaintiff in this action, but on the ground that the evidence is not admissible at this stage?

The COURT: I have several grounds in mind. I deem it unnecessary to state them all.

Mr. WITHINGTON: We offer then to prove the execution of this instrument and that it was last in the hands—last seen in the hands of the plaintiff in this action or its agent.

The COURT: There really is nothing before the court.

Mr. WITHINGTON: We except to your Honor's ruling.

Q. Have you ever seen the original of the paper which I showed you, Mr. Colburn?

(Objected to as incompetent, irrelevant and immaterial and not proper surrebuttal. Objection sustained.)

905 Q. Where did you last see the original of this paper, if you have ever seen it?

(Same objection, same grounds. Objection sustained.)

Q. Can you state whether or not the original of this paper was executed by the Kapiolani Estate, Ltd., and if so, at or about what time?

(Same objection, same ground, and on the additional ground it assumes something not in evidence. Objection sustained; exception by defendants.)

Mr. LEWIS: Have we exceptions to those other rulings of the court?

Mr. WITHINGTON: We desire an exception as to each of them.

The COURT: It will be allowed.

Mr. WITHINGTON:

Q. If you saw it at any time executed by the Kapiolani Estate, in whose possession was it when you last saw it?

(Objected to on the same grounds as the last objection, same ruling; exception by defendants.)

Mr. WITHINGTON: Now, please your Honor, we offer to show—

Mr. ROBERTSON: We object to counsel's stating offers, your Honor. The court has ruled against it already.

(Jury retires.)

Mr. WITHINGTON: We offer to show that on or about the 14th day of April, between that time and the 19th day of April of 1904, the original instrument of which this is a carbon copy, being the instrument which we have requested the production by the plaintiff in this action, was executed by the Kapiolani Estate, Ltd., by its president and its treasurer, and that it was then delivered to the attorneys-in-fact of the plaintiff, Kinney, McClanahan 906 & Cooper, and so far as the witness, whom we will show to be the treasurer of the Kapiolani Estate, Ltd., is concerned, that he has not seen it since, and when he last knew of it it was in the hands of the Kapiolani Estate, Ltd., and we offer—It was last in the hands of the attorneys for the plaintiff, W. W. Bierce, Ltd.

Mr. ROBERTSON: We object to the offer, if the court please.

The COURT: Objection will be sustained.

Mr. WITHINGTON: Save an exception.

(Jury recalled.)

The COURT: The objection to the offer is sustained.

Mr. LEWIS: Exception.

Mr. WITHINGTON:

Q. Did the Kapiolani Estate at any time between the 14th of April 1904 and the 23rd day of May 1904 surrender or release its rights to this railroad material, if any?

(Same objection.)

Q. To the W. W. Bierce, Ltd.?

(Same objection as stated in the last objection. Objection sustained; exception by defendants.)

Mr. WITHINGTON: I have one question to ask as included in my offer.

Q. What connection did you have with the Kapiolani Estate, in the months of April, May and June 1904?

(Objected to as not surrebuttal. Objection overruled; exception by pl'ff.)

A. Treasurer.

Q. What active duties?

(Same objection, same grounds, not surrebuttal. Objection overruled; exception by pl'ff.)

Mr. WITHINGTON: Everybody knows here that he is the 907 "whole cheese."

A. I don't know what you would call it.

Mr. PROUTY: Well, you can say the "whole cheese"; we are satisfied.

Mr. WITHINGTON: All right, if counsel is satisfied with that I am. That is all.

Direct examination of FRANK GERARD, called and sworn.

Mr. CATHCART:

Q. Mr. Gerard, where are you living at the present time?

A. At present, now?

Q. Yes, now?

A. Aiea, Halawa.

Q. In May of 1904 where were you living?

A. In Kailua.

Q. And do you know where the mill property known as the Kona Sugar Co's. mill is?

A. Yes sir.

Q. Do you know Robert L. Colburn?

A. Yes sir.

(Objected to as incompetent, irrelevant and immaterial and not proper surrebuttal. Objection overruled with the understanding it is preliminary. Exception by pl'ff.)

Q. You have seen Henry E. Cooper, have you?

908 (Objected to on the ground it is incompetent, irrelevant and immaterial and not proper surrebuttal. Objection overruled; exception by pl'ff.)

A. About Mr. Cooper?

Q. Yes.

A. Well——

The COURT:

Q. Do you know him; have you seen him?

A. No, I don't know him but I heard he came with Nahale.

Mr. CATHCART:

Q. Well, did you see him?

A. I saw a stranger there but I don't know who his name.

Mr. ROBERTSON: Move to strike out the answer on the ground it is not surrebuttal and not responsive, also hearsay; he said he heard he came with Nahale.

The COURT: That part may be stricken out, what he heard.

Mr. ROBERTSON: He saw a man there, a stranger, with Nahale. Have you seen him? That is not responsive to the question.

The COURT: Not altogether, no, that is true, but perhaps he may have something more definite. Objection overruled.

(Exception by pl'ff.)

Mr. CATHCART:

Q. Do you know M. F. Scott?

(Same objection.)

A. Yes sir.

(Same grounds.)

Q. Do you know Sheriff Nahale?

(Exception by pl'ff.)

A. Yes sir.

Q. Do you know Mr. Conant?

909 A. Conant, yes sir.

(Same objection, same ruling.)

MR. ROBERTSON: Move to strike the answer out on the ground it is incompetent, irrelevant and immaterial and not proper surrebuttal.

The COURT: The motion will be denied.

(Exception by pl'ff.)

MR. CATHCART:

Q. Do you remember seeing on the mill property that we have spoken about Mr. Scott and Conana and Nahale and Robert L. Colburn?

(Objected to as incompetent, irrelevant and immaterial and not surrebuttal.)

Q. In May 1904?

(Irrelevant, immaterial and not surrebuttal. Objection overruled; exception by pl'ff.)

A. Yes, I saw them there, yes.

Q. Do you remember the exact day?

A. No sir, I couldn't tell; I have forgot all about it; I don't know, I don't know.

Q. But it was sometime in May, 1904?

A. Yes sir.

(Objected to as leading. Motion to strike the answer out on that ground. Answer stricken out.)

Q. State as near as you can when it was that you saw these men on the mill property. As well as you can remember, when was it?

A. When was it? That date or——

Q. As well as you can remember, yes.

A. I can remember,—I know it is sometime in May 1904,
910 but the date I don't know, I don't know; it is Monday or Tuesday or Friday or I don't know, I couldn't——

Q. Now when you saw these men there where were Scott and Conant?

(Objected to as irrelevant and immaterial and not surrebuttal.)

A. Scott was on this——

MR. CATHCART: If the court wants me to state what I am going to show I can state in a very few words. I have a right to lead up preliminarily.

(Objection overruled; exception by pl'ff.)

Q. Where were Scott and Conant?

A. Mr. Cooper—they say Mr. Cooper, I didn't know him but I saw him,—stranger there with Mr. Nahale came from somewheres, I don't know where he came from, which road he came I don't know,—I saw that he came out from the mill, and then they went—Mr. Scott was outside the boundary of Waiaha—Mr. Scott was the other side of the boundary, not outside. Mr. Conant came a little further, about, I don't know, a hundred feet or more or two hundred, I don't know, and Mr. Conant went back again; then Mr. Nahale and the stranger went over to Mr. Scott and talked to him about it, I don't know what it was talking about because I was too far off.

MR. ROBERTSON: Move to strike the answer out on the ground that it is not surrebuttal.)

(Motion to strike denied; exception by pl'ff.)

MR. CATHCART:

Q. Who was with you, away off as you have stated; who was with you?

A. Well—

(Same objection, same ground.)

911 A. —I think Mr. Colburn.

(Objection overruled; exception by p'l'ff.)

A. Robert Colburn come and then Colburn went that way (showing) towards Scott.

Q. Where was Colburn?

A. Well, between me and Scott.

Q. And how far off was Colburn from where Scott and Cooper were at the time they were there at the boundary?

(Objected to as not surrebuttal. Objection overruled; exception by pl'ff.)

A. How far were Mr. Scott and Nahale—no, and Colburn?

Q. No, no; you were at one place?

A. Yes.

Q. Scott and Cooper and Colburn and Conant were at another. Now how far off from where Scott and Colburn was—Scott and Conant, was Colburn; how far off was Colburn from them?

A. Well, I don't know; about 100 feet I think.

Q. About a hundred feet?

A. About a hundred feet.

Q. And how far off were you?

A. I was about a hundred feet between.

Q. Between?

A. Yes, hundred feet. I was away off here and Colburn and Mr. Scott was over 200 feet from where I was to Mr. Scott over there.

Q. Now I want to know, Colburn, Robert Colburn, was about a hundred feet off from them; was he between where you were and where Conant and Scott and Cooper; is that right?

(Objected to as not surrebuttal; objection overruled, exception by pl'ff.)

912 A. I couldn't remember; I forget.

Q. Now what was your employment there at that time?

A. How? I was a watchman.

(Objected to as not proper surrebuttal.)

Mr. CATHCART: Mr. Cooper testified that there was 200 or 300 feet of rails taken up there. We want to show it is not so.

(Objection overruled; exception by pl'ff.)

Q. Now what was your employment there at that time?

A. Well, that time I was working for Mr. Colburn, working here and there, what he tell me to do I do.

Q. Now do you know what rails there on the mill property were taken up?

A. Yes.

(Objected to as improper surrebuttal. Objection overruled; exception by pl'ff.)

Q. Answer the question.

(Question read.)

Q. State what they were; how many rails were taken up.

(Same objection, same grounds.)

A. On the *further* of Waiaha—

(Objection overruled, exception.)

A. Waiaha is two rails, two rails, thirty-pound rails about 30 feet long, somewhere, 28 feet; only two, one on each—one on each boundary; one this side and one that side, and Holualoa 2 there is two rails there, one on each side.

Q. That is on each boundary?

A. On each boundary there are thirty feet, 30 pound rail 30 feet long, some of them 28; well, what they taken out, 28 or 30, I don't know.

Q. Now state whether there were any other rails taken up
913 outside of the property.

A. Near to where they took it up?

Q. Yes.

A. No, none there; well, may be six feet or four feet, I don't know; the track is like that, you see, they couldn't take it out, they got to saw it about even.

Q. That is the rail?

A. Yes.

Q. The rails that were taken up might have gone about six feet or so—?

A. Six or eight.

Q. On the outside of the property, but that was all?

A. That's all, only one side, only one side, one rail; then we put a crossing.

Q. There was not any 200 feet or anything like that taken up there?

(Same objection, same ground, also leading. Objection sustained.)

Cross-examination.

Mr. ROBERTSON:

Q. Well, did you notice whether any rails had been taken up outside of the Kapiolani Estate lands and towards the railroad crossing on the road?

A. Where was that? Outside the crossing where the railroad, where the Kailua road?

Q. Yes.

A. Well, that is not Kapiolani Estate.

914 Q. No, no, I mean weren't there some rails taken up near that crossing?

A. Yes, sir, yes.

Q. How many; a couple of hundred feet?

A. Well, I don't know, may be about—may be four rails.

Q. Four rails?

A. Four rails, may be four or five or six, I don't know.

Q. Five or six on each side, is that it?

A. May be, may be, may be 4 or 5 or 6.

Q. How long were those rails?

A. How long ago?

Q. How long were the rails?

A. Some 30 feet, some 28.

Q. 30 feet, so if there were five rails taken up that would be 150 feet?

A. May be 4, 5, I don't know.

Q. May be 6?

A. May be 6.

Q. But you are sure some were taken up?

A. May — 3 or 4, I don't know, may be 4, I think, I don't remember.

Q. That is, you mean four on each side, don't you?

A. Yes.

Q. Now where were those taken up?

A. When?

Q. Where; near the crossing?

A. Yes, very near; close to the road.

Q. That was between the railroad crossing and the Kapiolani Estate land, wasn't it?

A. Between Kahului and the crossing, yes.

Q. Yes, exactly, and Kahului was Kapiolani Estate, wasn't it?

915 A. Yes.

Q. Now where were those rails put that were taken up?

A. Taken one side.

Q. Lying on the ground piled?

A. Yes.

Q. Piled up on one side?

A. One side, yes.

Mr. ROBERTSON: That's all.

Mr. CATHCART: A matter that I overlooked:

Q. When were these rails taken up that you have last spoken about, those near the government road?

The COURT: Those that Mr. Robertson just spoke to you about.

Mr. CATHCART:

Q. When were they taken up?

A. I think the next day, next day when Mr. Scott and Nahale and Robert and Cooper; I think the next day, next day, I guess, I walked out there and I saw it. I don't know who took it up.

Q. They were ~~not~~ taken up then on the day Nahale was there with Cooper?

A. No, day after—

(Objected to as leading. Objection sustained.)

Mr. ROBERTSON: I move to strike out that last answer, your Honor sustaining my objection.

The COURT: The question will be stricken out and the jury will be instructed to disregard the answer to the last question.

Mr. ROBERTSON:

Q. You don't know what day those rails were taken up, do you?

A. No sir, I don't know.

916 Mr. CATHCART: There was a matter pending last night that has been overlooked so far. Mr. Robertson was reading some instrument and we objected to it on the ground that that which it was in rebuttal of was stricken out.

The COURT (to Mr. Robertson): While you were reading the document they discovered, as they thought, in the testimony, that the answer to which you were offering it in rebuttal had been stricken out.

(Argument.)

The COURT: I think as long as there have been several allusions to the trust deed in the record I will allow it to remain there. Motion to strike will be denied.

Mr. WITHINGTON: We except.

Direct examination of R. W. SHINGLE, recalled.

Mr. CATHCART:

Q. You have stated that you—Do you remember the position you held with the Waterhouse Trust Co. in—

The COURT: He wasn't quite sure.

A. Either president or secretary at the time.

Mr. CATHCART:

Q. This trust deed which is in evidence here, being plaintiff's Exhibit "NN," I will hand it to you and ask you to look at it and state whether or not in—Can you state whether or not—when you
917 delivered the property in the trust deed back to Mr. Hutchins, Clinton J. Hutchins?

(Objected to as irrelevant and immaterial, incompetent, not surrebuttal, having no bearing on any issue in this case. Objection sustained.)

Q. When were your advances repaid, all your advances repaid that you advanced under that trust?

(Same objection, same ground. Objection overruled; exception by pl'ff.)

A. They were paid at the time that we turned over the property to Mr. Hutchins; it was either in the month—the latter part of the month of January or the beginning of February; some time, I think, in February.

Q. What year?

Mr. ROBERTSON: Move to strike the answer out——

A. 1904.

Mr. ROBERTSON: We move to strike the answer out on the ground it is not responsive and brings in a mere conclusion. He talks about a delivery there.

The COURT: I think all the balance of the question except the time that the payment was made should be stricken out, the redelivery, the mention of redelivery, question will be stricken out and the jury will disregard it. The time of the payment will stand.

Mr. CATHCART:

Q. And when did you cease to operate under the trust deed?

(Objected to as irrelevant, immaterial and not proper surrebuttal. Objection overruled; exception by pl'ff.)

A. At the time of the payment, either in the latter part of January or the fore part of February of 1904.

918 Q. And when did your connection with the properties under that deed cease?

A. At the same time.

(Same objection same grounds. Motion to strike the answer out on the ground stated. Motion denied, exception by pl'ff.)

Q. Did you ever make any claim to this property after that time against the W. W. Bierce Co. Ltd.?

Mr. ROBERTSON: Objected to as irrelevant, immaterial and not proper surrebuttal.

The COURT: Objection sustained.

Mr. CATHCART: Exception.

Q. Or make any claim to the property after that time as against C. J. Hutchins, Trustee?

Mr. ROBERTSON: Same objection, same ground.

The COURT: Objection sustained.

Mr. CATHCART: Exception. Your witness.

Mr. PROUTY: If your Honor please, we move to strike out the evidence, the testimony of Mr. Shingle with reference to the trust deed

in question and the repayment of the money therein mentioned, on the ground that it isn't the best evidence of the satisfaction or discharge of the mortgage or of the deed of trust in the nature of a mortgage.

The COURT: The motion to strike will be denied.

Mr. PROUTY: Exception.

919 Cross-examination of R. W. SHINGLE.

Mr. PROUTY:

Q. Mr. Shingle, this instrument is dated June 13th 1903 and I understand you to say that the money was repaid to the Henry Waterhouse Trust Co. in January or February 1904?

A. To the best of my recollection, yes.

Q. What office in the Henry Waterhouse Trust Co. did you hold at that time?

A. Secretary.

Q. Treasurer?

A. Secretary.

Q. As such secretary did you have charge of the funds of the company and did the funds pass through your hands?

A. Of the Waterhouse Trust Co.?

Q. Yes.

A. No sir.

Q. Then what is your means of knowledge that the money was repaid at that time?

A. I handled the Hutchins trusteeship personally.

Q. The Hutchins trust deed?

A. Yes.

Q. You mean the paper, the instrument?

A. I mean the harvesting of the cane and the administration of the property under the trust deed to the Waterhouse Trust Co. was in my special supervision.

Q. Did you go over to North Kona, over to the district
920 there on the plantation and supervise the operation of the plantation?

A. On several occasions.

Q. On several occasions?

A. Yes sir.

Q. But that does not quite answer my question. I want to know whether money came into your hands as secretary of the Henry Waterhouse Trust Co.

A. It—I had knowledge this way, Mr. Prouty, by having access to the accounts as well as the sugar; we were reimbursed from the sales of sugar harvested from that property.

Q. Yes. Oh, handled the sugar? You ground the cane—

A. I handled—

Q. —and sold the sugar?

A. I instructed the—Mr. Conant was my manager there—

Q. Yes.

A. —and all of the papers in connection with the sales of that sugar came under my direct knowledge.

Q. But the money didn't come into your hands?

A. A portion of it did.

Q. A portion of it?

A. Yes sir.

Q. How much?

A. I wouldn't like to state how much.

Q. Well, about how much?

A. Well, I should say practically—nearly all of it. I can illustrate to you in this way; I can illustrate how that money came into my hands.

Q. Just tell how it did. You don't mean to make a picture of it, do you?

921 A. No, but to make it intelligent to you I will explain it in this way, that when the money was advanced by the Waterhouse Trust Co.—

Q. We are not talking about that now. How did the money—

A. By sale of sugars to Hackfeld & Co., a discount sale of sugars to Hackfeld & Co., in Kailua; I personally being on the ground and they wiring to Honolulu office of Hackfeld & Co. for confirmation of that.

Q. Who wired to Honolulu?

A. Hackfeld & Co.

Q. And you were over on the plantation?

A. I was on the plantation.

Q. And you mean that you received Hackfeld & Co.'s advices over there?

A. I made—negotiated the sale of some sugar over there to Hackfeld & Co.

Q. Don't you—

A. Personally negotiated the sale of the sugar.

Q. To Hackfeld's representative over in Kona?

A. Yes sir.

Q. Yes, well, did you receive the money there?

A. Received a check in Honolulu.

Q. You received a check?

A. Yes sir.

Q. Did the check pass through your hands personally?

A. Yes sir.

Q. And that is true of all the money that you realized from the proceeds of the sugar of this plantation?

A. It—I can't say that it actually passed through my hands—it passed to the treasurer of the corporation.

922 Q. Yes. Well, how much of it passed through your hands? how much of these checks passed through your hands?

A. I wouldn't like to say now.

Q. Well, half of it?

A. I think more than half of it.

Q. More than half; a little more or a great deal more?

A. Well, it was something more than half.

Q. And all in the form of checks drawn to the order of Henry Waterhouse Trust Co.?

A. As I remember it.

Q. When were you last on this plantation?

(Objected to; objection sustained.)

Q. Then you say that something more than half of the money passed through your hands, and your knowledge that the balance of the money was paid is derived from what the treasurer of the Henry Waterhouse Trust Co. told you about it, isn't it?

A. That, and coupled with the—with the fact that the correspondence touching on the Kona plantation or the remittances would come through my hands and passed by me over to the treasurer of the company.

Q. Correspondence with Hackfeld & Co.?

A. With Hackfeld or whoever we were doing business with.

Q. Yes.

A. A portion of this sugar was sold through our own agents to our agents in San Francisco.

Q. Were you there in the use of it for the company in San Francisco?

(Objected to as incompetent, irrelevant and immaterial and not proper cross-examination. Objection sustained; exception by pl'ff.)

Q. You haven't any of the checks or correspondence with 923 you that you refer to?

A. No sir.

Mr. PROUTY: I now move to strike out the direct testimony, all the testimony of the witness to the effect that the money was paid, on the ground that it is secondary and is incompetent for that reason.

The COURT: The motion to strike will be denied.

Mr. PROUTY: Exception.

That's all.

Defendants rest.

Plaintiff rests.

(Jury excused until 2 o'clock tomorrow afternoon.)

924 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

W. W. BIERCE, LTD., Plaintiff.

vs.

WILLIAM WATERHOUSE et al., Defendants.

MAY 22, 1908.

Mr. LEWIS: At this time, in order to preserve our rights in the matter I desire to make a formal motion for a directed verdict on the grounds stated in my motion for a non-suit. I presume your Honor will not want me to set them out in full; your Honor knows the grounds of that motion.

The COURT: If you refer to that that will be sufficient.

Mr. LEWIS: And also on the further ground that the evidence shows the sureties were released by the acts of C. J. Hutchins, trustee, and the plaintiff, its agents and attorneys in relation to the property for which the return or delivery bond was given.

The COURT: The motion will be denied.

Mr. LEWIS: And exception.

The COURT: Exception allowed.

(Counsel address the jury.)

925 The COURT: Gentlemen of the jury: The court instructs you that the following facts are undisputed in the evidence on this trial, namely:

That Clinton J. Hutchins, trustee, as principal, and Henry Waterhouse and Arthur B. Wood, as sureties, executed to the plaintiff, William W. Bierce, Limited, on July 21st, 1903, the so-called return or re-delivery bond mentioned in the evidence; that said bond was executed and delivered to the High Sheriff and filed by him in the action of replevin mentioned in the evidence in which it was entitled, and that the conditions thereof were that if the property in controversy in said replevin suit, and all thereof, should be well and truly delivered to the plaintiff therein, said William W. Bierce, Ltd., if such delivery should be adjudged, and payment to said plaintiff should be well and truly made of such sum as might for any cause be recovered against the defendant, Clinton J. Hutchins, Trustee, then said obligation should be null and void, otherwise to be and remain in full force and effect; Also, that thereafter, on the 19th day of March, 1904, William W. Bierce, Limited, the plaintiff in said action of replevin, recovered judgment therein in this court against the defendant therein, Clinton J. Hutchins, Trustee, adjudging that he forthwith return into the possession of the plaintiff the railroad rails, locomotives, cars, spikes, joints and other railway material constituting all of the property in controversy, and further adjudging that said William W. Bierce, Limited, have and recover from said Clinton J. Hutchins, Trustee, the sum of ten hundred and forty-five dollars as damages for the detention of said property from the 1st day of June, 1903, until

926 the date of said judgment, together with the costs of said action taxed at the sum of fifty dollars and fifty cents; also adjudging that on failure of said Clinton J. Hutchins, Trustee, to forthwith make such return of said property into the possession of said plaintiff, that said plaintiff, William W. Bierce, Limited, have and recover from said defendant, Clinton J. Hutchins, Trustee, the value of said property, found and adjudged to be twenty-two thousand dollars, together with the aforesaid sum of ten hundred and forty-five dollars, damages for detention, and costs taxed at fifty dollars and fifty cents; Also that thereafter, on April 15th, 1904, the special execution introduced in evidence was issued on said judgment, which was, thereafter, on the 23rd day of May, 1904, returned into the court by the sheriff, unsatisfied; Also that thereafter, on exceptions taken and prosecuted by said Clinton J. Hutchins, Trustee, the supreme court of the Territory of Hawaii

entered judgment in said action of replevin, on the 6th day of May, 1905, reversing the said judgment in this court therein and sustaining the exceptions of the defendant, Clinton J. Hutchins, Trustee, in so far as they raised the question of election, and remanding said suit to this court with directions to enter judgment for the defendant therein, with costs. Also, that thereafter, on the 8th day of April, 1907, on an appeal prosecuted from said judgment of said supreme court by said William W. Bierce, Limited, to the Supreme Court of the United States, the latter court entered its judgment therein, reversing said judgment of the supreme court of this Territory and awarding to said William W. Bierce, Limited, its costs of said appeal, and remanding said cause to the supreme court of this Territory for further
927 proceedings, in accordance with the mandate and opinion of the Supreme Court of the United States filed therein; Also, that thereafter, on the 27th day of September, 1907, the supreme court of the Territory of Hawaii, in accordance with said mandate and opinion, entered judgment in said action in favor of said William W. Bierce, Limited, and against said Clinton J. Hutchins, Trustee, for the sum of seven hundred and forty-eight dollars and fifty-seven cents costs, which judgment remains unpaid and unsatisfied; also, that thereafter, in accordance with said mandate and opinion of the Supreme Court of the United States, the supreme court of the Territory of Hawaii made and entered an order in said action of replevin overruling the exceptions of said defendant, Clinton J. Hutchins, Trustee, a notice and certified copy of which said order constituting the mandate of said Supreme Court has been filed in this court in said action of replevin, the effect of which is to leave the said judgment of this court in full force and effect, the same as if no judgment of reversal thereof had ever been rendered by the supreme court of this Territory; Also, that on or about the 18th day of April 1904 the defendant, Clinton J. Hutchins, Trustee, paid to the plaintiff, William W. Bierce, Limited, the amount of the damages for detention, ten hundred and forty-five dollars and costs taxed at fifty dollars and fifty cents recovered by the said judgment of this court, together with interest on the value of the property in controversy therein, adjudged to be twenty-two thousand dollars from the date of said judgment, March 1904, until the date of the issuing of said execution, April 15th, 1904, the three items so paid amounting in all to the sum of
928 eleven hundred and ninety-eight dollars and twenty-five cents; aside from which nothins has been paid on said judgment to the plaintiff, William W. Bierce, Limited, and the sum of twenty-two thousand dollars therein adjudged to be the value of the property in question, has not nor has any part thereof, nor interest on said sum since the 15th day of April, 1904, been paid to the plaintiff, William W. Bierce, Limited; Also, that on or about the 20th day of February, 1904, Henry Waterhouse, one of the sureties on said re-delivery bond, died at Honolulu, leaving a will, in which he appointed the defendants, William Waterhouse and Albert Waterhouse as executors thereof, and that said will

was admitted to probate and letters testamentary thereon were duly granted and issued to said executors by this court on or about the 4th day of April, 1904; Also, that thereafter and before the beginning of this action the plaintiff presented to the said executors its claim against the estate of the said Henry Waterhouse, deceased, for the value of said property as so adjudged to be the sum of twenty-two thousand dollars, with interest thereon, which claim was rejected by said executors.

The principal questions which you will have to consider are, whether the property involved in the replevin case has been returned to the plaintiff; or, if not, whether any actual and sufficient tender of the property was made to the plaintiff by Hutchins.

The court instructs the jury that the said Henry Waterhouse by executing the said re-delivery bond, as one of the sureties thereon, in contemplation of law authorized said Clinton J. Hutchins, Trustee, to represent him in said action of replevin, and 929 said Waterhouse thereby became identified with said Clinton J. Hutchins, Trustee, in interest and claimed in privity with him, so as to be concluded by the proceedings and judgment in said replevin suit, and that the record of the proceedings and judgment in said suit are also conclusive and binding upon the defendants in this suit, William Waterhouse and Albert Waterhouse, as executors under the will and of the estate of Henry Waterhouse, deceased.

The court instructs you, that by executing said redelivery bond the obligors therein, including said Henry Waterhouse, admitted that said Clinton J. Hutchins, Trustee, had possession of the property in controversy at the commencement of said replevin suit, and that said property was taken out of his possession when levied upon and seized by the sheriff in said suit, and was returned into his possession by the sheriff upon the execution and delivery of said bond; and that these admissions cannot be controverted on this trial but are binding and conclusive upon the defendants in this suit, who, in respect to any of the matters so admitted, are estopped from alleging that the contrary is true.

The court instructs the jury, with reference to the written offer to return the property in question, signed by Clinton J. Hutchins, Trustee, and delivered to the plaintiff's attorneys, bearing date the 18th day of April, 1904, which has been introduced in evidence by the defendants, that the delivery of this written offer did not alone and by itself constitute a return of the property in question such as to relieve the defendants from liability in this action; and that unless you believe from the evidence that the delivery of said written offer was accompanied by such action on the part of said Clinton J. Hutchins, Trustee, as would enable the plaintiff or its 930 attorneys to obtain actual possession of the property in question, your verdict should be for the plaintiff.

The court instructs the jury that it is a question of fact for the jury to determine from all the facts and circumstances proved on the trial whether or not said Clinton J. Hutchins, Trustee, made a bona fide tender of the property in question to the plaintiff's

attorneys. That in order that an offer such as that introduced in evidence on this trial may constitute such a bona fide tender, it is the law that it must be made in good faith for the purpose and with the intention of putting the party to whom it is made in possession of the property, and that it be not made colorably or for the purpose of laying the foundation for future litigation or defenses, without any intention of actually surrendering the property; and if you believe from the evidence that the offer in question was not made by said Clinton J. Hutchins, Trustee, in good faith for the purpose and with the intention of putting William W. Bierce, Limited, in actual possession of the property in question, your verdict should be for the plaintiff.

In regard to the deed dated June 13, 1903, which is in evidence, by which Clinton J. Hutchins, Trustee, conveyed the property in question to the Henry Waterhouse Trust Company, I instruct you that the recording of that deed in the Registry Office gave notice to the plaintiff that the legal title to the property had been transferred by Hutchins to the Henry Waterhouse Trust Company; and if you find from the evidence that an actual tender was made of the property by Hutchins, and refused by the plaintiff, you may take into consideration the fact that said conveyance to the Waterhouse Trust Company was on record, in deciding whether plaintiff was justified in refusing the tender.

931 The court instructs the jury, with reference to the question whether or not Clinton J. Hutchins, Trustee, returned the property in question to plaintiff or made an actual tender of the property to the plaintiff in good faith, that the meaning of the conditions of the re-delivery bond in evidence was not that said Clinton J. Hutchins, Trustee, would allow the plaintiff, William W. Bierce, Limited, to hunt up the property and get it if it could, but was that he would return it to the plaintiff, if the plaintiff succeeded in the action of replevin, and, while it is true that the property in question was so heavy and bulky as to make it difficult of actual manual delivery, and that the rule as to delivery is less strict as to such property than as to smaller articles, still it was the duty of Clinton J. Hutchins, Trustee, to take such action as would enable the plaintiff to obtain actual possession of the property, and unless the jury believe from the evidence that he had done this then he had not returned the property to the plaintiff within the meaning of the statute and the conditions of the bond, and your verdict should be for the plaintiff.

The court instructs the jury that the judgment in the replevin suit imposed upon Clinton J. Hutchins, Trustee, the duty of taking active measures to surrender the property to William W. Bierce, Limited, and not merely the duty of passive submission to a forcible taking of the property by legal process. Under the law it was the duty of Clinton J. Hutchins, Trustee, to seek William W. Bierce, Limited, or its representatives, and deliver the property to them, if they would receive it; and if the jury believe from 932 the evidence that he failed to do this such failure constituted a breach of the conditions of the bond, rendering him and his sureties liable.

The mere writing and sending of a letter to the plaintiff's attorneys that the property was offered and delivered to the plaintiff would not be sufficient. When the judgment was entered in the replevin action in favor of the plaintiff, it became the duty of the defendant Hutchins to redeliver the property to the plaintiff or pay its value. The writing of such a letter would not amount to a delivery unless Hutchins followed it up and supplemented it with active steps to secure to the plaintiff an actual delivery of the property. In this connection you are entitled to take into consideration any evidence which may tend to show whether at the time any such offer was made the property was on land belonging to Hutchins or on land belonging to other persons and over which he had no control. The plaintiff was not required to go upon the lands of third persons to locate the property and get it if it could.

An offer or tender to deliver property in order to be effectual must be made in good faith. Whether or not the offer claimed to have been made by Hutchins to return the property in question was made in good faith is for you to decide upon the evidence in this case. In this connection you should consider whether it has been shown that at the time the offer was made Hutchins had authority to return the property.

I instruct you that under the judgment which was rendered in the replevin case it became the duty of the defendant to return all of the property in question. The plaintiff was not required
933 to accept a portion of it, nor was the sheriff authorized to accept any portion of it less than the whole. If, therefore, you believe from the evidence that a part only of the property was tendered, or that some of it was so situated that it could not for any reason be delivered by Hutchins to the plaintiff, your verdict must be for the plaintiff.

I charge you that the return of the deputy sheriff which is indorsed on the execution, to the effect that he was unable to levy the writ on the property therein described and that he therefore returned the writ unsatisfied, is a part of the record of this court in the replevin case, and as such it imports absolute truth and is binding and conclusive on the defendants as to all acts done under and pursuant to the writ while it was in the hands of the deputy sheriff. You are therefore instructed, in considering your verdict, to disregard all testimony that you may find which tends to contradict the return of the deputy sheriff relating to the time the execution was in his hands.

The court instructs the jury that nothing short of an absolute or unconditional tender of the property in question to the plaintiff would relieve the obligors on the bond from liability to the plaintiff for the value of the property, and if you believe from the evidence that the offer of Hutchins to return the property in question to the plaintiff was made upon any conditions or condition, then it would not constitute a defense to this action.

I instruct you that upon the return of the execution in evidence in this case, the right at once accrued to the plaintiff to maintain

its action against the principal and sureties on the redelivery bond for the value of the property as fixed in the judgment in the replevin case, with legal interest thereon and such costs as may have been properly taxed against the defendants in that case, and nothing less than the payment of such value, interest and costs would constitute a defense to this action.

If you find from the evidence that a substantial portion of the property in question, at the time the execution was in the hands of the sheriff, was on land belonging to the Kapiolani Estate, that such land was fenced on both sides, and portions of the rails had been taken up so that the locomotive and cars on the track could not be readily moved off; and if you also find that Scott was prohibited from going upon that land and taking the property off, your verdict must be for the plaintiff, provided you find from the evidence that the plaintiff has in all respects made out its case.

If you find from the evidence that the rails in question or a substantial part of them were lying on lands of third persons, and that neither Hutchins nor Scott made an attempt to secure the delivery of them to the sheriff, then you may consider these facts in arriving at your verdict.

The court instructs the jury that the fact that the suit was discontinued during the trial as against the defendants Clinton J. Hutchins, Trustee, and Arthur B. Wood, the two surviving obligors on the redelivery bond mentioned in the evidence cannot properly be considered by the jury in reaching a verdict in this case; that the plaintiff could not properly have proceeded to trial against

the present defendants without discontinuing its suit as
935 against said survivors, and the jury will not consider such discontinuance as a circumstance unfavorable to the plaintiff's case or as any evidence of an intention on the part of the plaintiff to release said obligors from their liability on said bond, if the jury believe from the evidence that they are liable thereon; and the jury are instructed to disregard any and all remarks made by counsel in the presence or hearing of the jury to the effect that such discontinuance tends to prove an intention on the part of the plaintiffs to release said surviving obligors.

The court instructs the jury in this case that the court is the judge of the law and the jury are the judges of the facts, and it is the duty of the jury in considering their verdict to apply to the facts and circumstances in evidence the law as given to the jury in the instructions of the court, and thereby determine whether their verdict shall be for the plaintiff or for the defendants.

In regard to the document which has been received in evidence, dated April 14, 1904, being an option given to the Kapiolani Estate by the plaintiff for the sale of the property in question, I charge you that the court having decided in the replevin case that the property belonged to the plaintiff, the plaintiff had the right to sell it or give an option on it whether plaintiff had actual possession of it at the time or not, and the option in question or any similar option could therefore have been given without prejudicing in any way the

plaintiff's claim that Hutchins had not made a redelivery of the property.

In regard to the deed of conveyance dated Nov. 7th, 1905, from Clinton J. Hutchins, Trustee, to Francis B. McStocker, I instruct you that the legal construction and effect of that document was to convey to McStocker all of the property sold and conveyed to Hutchins by F. L. Dortch, receiver of the Kona Sugar Company, which he, Hutchins, had not already conveyed to the C. J. Falk and J. R. Sloan mentioned in said deed.

The jury are instructed that they are the judges of the credit that ought to be given to the testimony of the different witnesses, and the jury are not bound to believe anything to be a fact because a witness has stated it to be so, provided the jury believe from all the evidence that such witness is mistaken or has knowingly testified falsely.

The Court instructs the jury that in determining the weight to be given to the testimony of the several witnesses you should take into consideration their interest in the event of the suit, if any such is proved; their apparent candor or lack of candor, their apparent fairness or bias, if any such appears; their appearance and manner on the stand; the reasonableness or unreasonableness of the story told by them, and all the facts and circumstances tending to corroborate or contradict such witnesses, if any such are proved.

The court instructs you that in passing upon the testimony of the witnesses you have a right to take into consideration any interest which such witnesses may have in the result of this suit, if any is proved, and to give to the testimony of such witnesses only such weight as you think it entitled to under all the circumstances proved on the trial.

The court instructs the jury that while it is the duty of the jury to carefully scrutinize and dispassionately weigh the evidence of all the witnesses in the case, still it is your sworn duty to give proper credit to the evidence of each and all of the witnesses, and, if possible, to reconcile all of the evidence in the case with the presumption that each witness has intended to speak the truth, unless by their manner of testifying on the witness stand, or by inconsistent statements sworn to, or by testimony inconsistent with other credible evidence in the case, you are led to believe that the testimony of some one, or more, of the witnesses is untruthful or unreliable, or unless you are led to believe, from a manifestation of interest, bias or prejudice that such witness or witnesses have been inclined to exaggerate, color or suppress the truth, or unless they have been impeached in some of the modes known to the law.

The court instructs the jury with reference to all questions to which objections have been sustained by the court and all testimony of witnesses which has been stricken out by the court, as well as with reference to all papers and documents which have been offered but not received in evidence, that the jury should disregard all such matters as well as all remarks of counsel in relation thereto, if any have been made, and should consider only the evidence actually introduced on the trial in arriving at their verdict.

If the jury believe from the evidence that any witness has wilfully sworn falsely on this trial, as to any matter or thing material to the issues in the case, then the jury are at liberty to disregard the entire testimony of such witness, except in so far as it has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

The court instructs the jury that while the burden of
938 proof rests upon the plaintiff to make out its case by a preponderance of the evidence, still the preponderance of the evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their apparent candor or lack of candor, if any, their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial; and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

The jury are instructed that it is not proper for counsel, in the argument of a case, to state any matter or things bearing upon the questions of fact, and claimed to be within his own personal knowledge or which may have been stated to him by others, not witnesses in the case; and you are further instructed to disregard all such statements, if any have been made, and to make up your verdict upon the evidence actually given in this case, without placing any reliance upon or giving any credit to any statements of counsel not supported by the evidence. In determining any of the questions of fact presented in this case you should be governed solely by the evidence introduced before you.

The court instructs you that while an attorney is a competent witness for his clients on the trial of a cause, and the testimony
939 of such a witness should not be disregarded by you simply because he is an attorney testifying in favor of his own clients, still in such a case the jury are the judges of the weight and credit to which such testimony is entitled, and it is proper for you to take into account the fact of such relation of attorney and client in determining the degree of weight which ought to be given to the testimony of such witness.

If the jury find the issues for the plaintiff, by their verdict, they should assess the plaintiff's damages in their verdict at the sum of Twenty-two Thousand dollars, determined to be the value of the property in question by the judgment in replevin, with interest thereon at the rate of six per cent per annum from April 15th, 1904, to which should be added seven hundred and forty-eight dollars and fifty-seven cents, the amount of the judgment for costs rendered by the supreme court of the Territory on September 27th, 1907, in favor of William W. Bierce, Limited, and against Clinton J. Hutchins, Trustee, with interest thereon at the rate of eight per cent per an-

num from September 27th, 1907, aggregating the sum of \$28,-156.74.

I instruct you that the plaintiff must prove its case by a preponderance of evidence, and the burden of the proof is upon it. If it does not establish its case by such preponderance of evidence, then your verdict must be for the defendants.

I instruct you that it is not necessary, in order to discharge the sureties from liability in this case, that a redelivery of the goods should be made. The condition of the bond would be satisfied, so far as the sureties were concerned, by a valid tender made in
940 good faith by the principal on the bond; and if you find that such valid tender was made your verdict must be for the defendants.

In making such tender, where the goods are of the character of these in suit, it is not necessary to make a manual delivery. It is enough that they be tendered to be delivered in the same condition and at the same place as they were at the time the re-delivery bond was given.

The plaintiff, the obligee of the bond, is bound to act in good faith and with reasonable promptness towards the defendants in this action, whose testator, Henry Waterhouse, was a surety; and in case you find that a valid tender was made, as I have already instructed you, the plaintiff was bound in good faith to such surety and his representatives to accept or reject it promptly.

I instruct you that in this action on the redelivery bond it is not necessary that a tender of property concerning which the bond was given should be kept good, and therefore if you find from the evidence that a valid tender of the property was once made by the principal obligor of the bond, Clinton J. Hutchins, Trustee, or his agent, to William W. Bierce, Ltd., or its agent, then and thereafter there was no obligation or liability upon the part of Clinton J. Hutchins, Trustee, as far as the rights of his sureties are concerned to keep the property in a position to deliver it up to William W. Bierce, Ltd., for a valid tender once made which is refused by the creditor, William W. Bierce, Ltd., in this case, will discharge and release the surety, Estate of Henry Waterhouse in this case, at once from all liability on the redelivery bond, and your verdict should be for the defendants.

941 I instruct you that the plaintiff, William W. Bierce, Ltd., being a corporation and only able to act through its officers or attorneys or agents, that all evidence as to the acts of its officers, attorneys and agents are to be considered by you as the acts of the corporation itself on the question as to whether the corporation plaintiff acted in good faith toward the surety on the redelivery bond, Henry Waterhouse, deceased, in all matters connected with the replevin suit and the judgment obtained in such replevin suit.

Although, gentlemen of the jury, I have heretofore instructed you that certain facts are undisputed in the evidence on trial, there are however certain other facts which are also undisputed in the evidence, which are as follows:

That prior to and at the time of the execution of the redelivery bond, William W. Bierce, Ltd., had knowledge of the situation of the property in question in Kona, Hawaii, that said property was not piled up or stored, but was laid down and used as a plantation railway and equipment; and that at no time during the replevin action or the times referred to in the evidence in this action on the bond was any of said property removed away from the premises or so called Kona plantation; that at the time the special execution introduced in evidence was issued on said judgment on April 15th, 1904, the defendants had appealed to the supreme court of Hawaii from the judgment of the circuit court which had issued such execution.

Now, gentlemen of the jury, you have given long and patient attention to the evidence; you have heard the arguments of counsel and the instructions of the court are now completed. It remains only for me to say to you that you are governed by the law as the court has laid it down to you, and as a basis for your verdict you look to the evidence before you and to nothing else. Courts and jurors do not know anyone who appears before them, either plaintiff or defendant by name; we only look to the law and the facts, and to whatever conclusion the law and the facts lead us, that is to be considered conclusively as justice. It is the only safe and proper way in which causes between parties and justice may be properly conducted. Courts and jurors must have absolute regard for their oaths and the obligations placed upon them by assuming the duties they do; therefore, gentlemen of the jury, to whatever verdict the evidence in this case, under the law as laid down to you by the court directs you, whatever the evidence says your verdict should be, that should be your verdict, your conscience and your judgment to be your guide.

The bailiff will hand you two forms of verdict, according as you may find; if for the plaintiff one, if for the defendant the other. You may retire now, gentlemen.

Mr. ROBERTSON: On behalf of the plaintiff, we desire to note the following exceptions to your Honor's charge: To the refusal of the court to give plaintiff's requested instructions Nos. 1, 11, 13, 17A, 13B, 20A, 27 and 28. We also except to your Honor's modification of plaintiff's requested instructions Nos. 2, 8, 10, 13C and 16. We also desire to except to your Honor's giving of defendants' requested instructions Nos. 2, 10, 15, 16 and 23.

The COURT: Instructions may be so noted.

943 Mr. LEWIS: On behalf of the defendants in this action we desire to except to the giving by your Honor of instructions Nos. 2, 2A, 3, 4, 5, 6, 6A, 7, 8 as modified, 9, 10 as modified, 12, 13C, 13D, 14, 15 as modified and 16 as modified, 17, 18A, 18B, 20, 21, 22A, 23, 24, 25, 26, and 29. And also desire to except, on behalf of the defendants, to the refusal of the court to give defendants' instructions A, 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 17, 18, 19, 20, 21, 22, to give 23 modified, and 24.

The COURT: Exceptions may be so noted. Now gentlemen of the jury you may retire to consider your verdict.

(Jury retires and returns. Verdict read.)

Mr. LEWIS: Your Honor, at this time, on behalf of the defendants, I desire to except to the verdict as being contrary to the law and the evidence and against the weight of the evidence, and give notice of motion for new trial.

I hereby certify the foregoing to be a complete and accurate extension of my shorthand notes of the proceedings had and testimony taken in the above entitled cause.

(Signed)

J. L. HORNER,
Official Shorthand Reporter.

Endorsements: 133A. Law 6023. W. W. Bierce, Ltd., vs. Clinton J. Hutchins, et al. Transcript. Filed November 11, 1908, at 3:45 o'clock P. M. J. A. Thompson, Clerk. S. C. No. 383. W. W. Bierce, Ltd., v. Clinton J. Hutchins, Tr., et al. Transcript of Testimony.

944 On the 18th day of October, A. D. 1909, in the October Term of said Supreme Court of the year 1909, in the record of the proceedings in said entitled cause, appears the following entry, to wit:

945 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

Clerk's Minutes.

Vol. 3, p. 162.

MONDAY, Oct. 18, 1909.

Court convened at 10 o'clock A. M.

Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. Antonio Perry, JJ.

S. C., No. 434.

From page 146.

To " 176.

WILLIAM W. BIERCE, LIMITED,

v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Error to Circuit Court, First Circuit.

Hearing Upon Plaintiff's Motion for a Writ of Certiorari.

Appearances:

C. H. Olson for the Motion.

A. Lewis, Jr. — Contra.

The above entitled motion having been set this day for hearing, after the Court convened, Chief Justice Alfred S. Hartwell asked Mr. Olson if he had a memorandum of the exhibits he wished to obtain from the Circuit Court, to which question he answered in the negative, he further said that those exhibits he desired were made part of the defendants' bill of exceptions.

Mr. Lewis for the defendants objected to the motion and to
946 the suggestion of the diminution of the record after the case is submitted.

After a brief argument by respective counsel, the Court then rendered its oral ruling granting the motion.

J. A. THOMPSON,
Clerk Supreme Court.

947 On said 19th day of October, A. D. 1909, an order of the Supreme Court of the Territory of Hawaii was made and entered and filed in the clerk's office of said Supreme Court, which said order and the return thereto and the record, proceedings and exhibits returned and filed with said return on the 22nd day of October, A. D. 1909, in the clerk's office of said Supreme Court, are in the words and figures following, to wit:

948 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,
v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors, &c.,
under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Error to Circuit Court, First Circuit.

Order.

Whereas, in an action heretofore pending before the Circuit Court of the First Circuit, Territory of Hawaii, in which the above named William W. Bierce, Limited, was plaintiff, and the above named William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, were defendants, which action is now pending in the Supreme Court of the Territory of Hawaii on Error to said Circuit Court, the said defendants did allege certain exceptions which were incorporated in a bill of exceptions and certified to said Supreme Court; and

Whereas the said bill of exceptions of the said defendants together with certain matters made a part thereof by reference is on file and of record in said Supreme Court in the said cause on exceptions in said Supreme Court;

Now therefore it is hereby ordered that the said bill of exceptions and all matters made a part thereof by reference now on file and of

949 record in said Supreme Court in the said cause on exceptions
in said Supreme Court be transferred to the record and files
of the said cause in the said Supreme Court on Error to said
Circuit Court as aforesaid.

Dated, Honolulu, T. H., October 19th, 1909.

By the Court:

(Signed)

J. A. THOMPSON,

[SEAL.]

Clerk Supreme Court, Territory of Hawaii.

H.

Endorsed: No. 434. In the Supreme Court of the Territory of Hawaii. William W. Bierce, Limited, Plaintiff in Error, v. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, Defendants in Error. Error to Circuit Court. First Circuit. Order. Filed October 19, 1909, at 11:15 A. M. J. A. Thompson, Clerk.

950 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,

vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Error to Circuit Court, First Circuit.

Return and Certificate.

Pursuant to the order of the Supreme Court of the Territory of Hawaii entered in the above entitled cause on the 19th day of October, 1909, J. J. A. Thompson, Clerk of said Supreme Court, have transferred, and do transfer herewith from the records and files of that certain cause in said Supreme Court on exceptions from the Circuit Court of the First Circuit, Territory of Hawaii, entitled: "William W. Bierce, Limited, Plaintiff-Appellee, vs. Clinton J. Hutchins, Trustee, Arthur B. Wood; and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, defendants-appellants," to the records and files in said Supreme Court in the above entitled cause on Error to said Circuit Court, the following documents and matters, to wit:

I. Original Bill of Exceptions of William Waterhouse and Albert Waterhouse, executors under the will and of the Estate of Henry Waterhouse, deceased, defendants, filed in the above entitled cause in the said Circuit Court, together with the order of allowance thereof, dated November 28th, 1908, made by the Honorable J. T. De Bolt, First Judge of said Circuit Court.

951 II. The transcript of record containing transcripts of the following pleadings, documents and matters on file in said

cause in said Circuit Court, made a part of the said Bill of Exceptions by reference, to-wit:

1. Plaintiff's Bill of Complaint, annexed thereto as Exhibit "A" thereof, is copy of Return Bond.

2. Plea in Abatement of William Waterhouse and Albert Waterhouse executors under the will and of the Estate of Henry Waterhouse, deceased, to the Bill of Complaint.

3. Amended Bill of Complaint, annexed thereto as Exhibit "A" thereof, is copy of Return Bond.

4. Demurrer of William Waterhouse and Albert Waterhouse, executors under the will and of the Estate of Henry Waterhouse, deceased, to amended Bill of Complaint.

5. Answer of William Waterhouse and Albert Waterhouse, executors under the will and of the Estate of Henry Waterhouse, deceased, to Amended Bill of Complaint.

6. Motion by plaintiff for continuance filed January 3, 1906, annexed thereto is the affidavit of A. G. M. Robertson.

7. Motion by plaintiff for continuance filed April 4, 1906, annexed thereto is the affidavit of A. G. M. Robertson.

8. Affidavit of A. Lewis, Jr., in opposition to the motion for continuance.

9. Notice of motion by defendants to set cause for trial filed September 4, 1906.

10. Instructions requested by plaintiff.

11. Instructions requested by defendants William Waterhouse and Albert Waterhouse executors under the will and of the Estate of Henry Waterhouse, deceased.

12. Verdict.

13. Motion by defendants for judgment *non obstante veredicto*.

952 14. Motion by defendants William Waterhouse and Albert Waterhouse, executors under the will and of the Estate of Henry Waterhouse, Deceased, for a new trial.

15. Judgment.

16. Extracts Clerk's Minutes Circuit Court First Circuit.

17. Subpœna issued for John F. Colburn and return of service thereof.

18. Præcipe.

19. Clerk's certificate to transcript of record.

III. The following original Exhibits filed in said cause in said Circuit Court and made a part of said Bill of Exceptions by reference:

1. Plaintiff's Exhibit "W," being original judgment of the Supreme Court of the Territory of Hawaii in Cause No. 265 in said Supreme Court entitled: "William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee."

2. Plaintiff's Exhibit "X," being copy of United States Supreme Court order allowing plaintiff's appeal, plaintiff's appeal bond filed January 13, 1906, order of supersedeas March 5, 1908, motion for writ of supersedeas accompanying order of March 5, 1906, assignment of errors United States Supreme Court January 13, 1906, all

in said cause No. 265, in said Supreme Court entitled "William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee."

3. Plaintiff's Exhibit "Y," being original mandate of United States Supreme Court and order for costs and vacating order, May 6, 1905, in said cause No. 265, in said Supreme Court entitled "William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee."

4. Plaintiff's Exhibit "Z," being original decision on Exception and notice, in said cause No. 265 in said Supreme Court entitled

"William W. Bierce, Ltd., vs. Clinton J. Hutchins, Trustee."

953 5. Plaintiff's Exhibit "XX," being original assignment of errors, in said cause No. 265 in said Supreme Court entitled "William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee."

And I do certify that the same constitute the Bill of Exceptions in said order mentioned and all Exhibits, documents and matters made a part of said Bill of Exceptions by reference still remaining in the files and records of the said cause in said Supreme Court on exceptions to said Circuit Court, and that the transcript of evidence, and all other exhibits and matters made a part of said Bill of Exceptions by reference not transferred herewith as aforesaid are no longer in the files and records of said cause in said Supreme Court on Exceptions to said Circuit Court, but were on the 17th day of June, 1909, returned to said Circuit Court.

Witness my hand and the seal of the Supreme Court of the Territory of Hawaii this 22d day of October, 1909.

(Signed)

J. A. THOMPSON,

[SEAL.]

*Clerk of the Supreme Court of the
Territory of Hawaii.*

Endorsed: S. C. No. 434. In the Supreme Court of the Territory of Hawaii. October Term, 1909. William W. Bierce, Ltd., Plaintiff in Error, vs. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, Defendants in Error. Supreme Court Clerk's Return and Certificate. Filed Oct. 22, 1909, 2 P. M. J. A. Thompson, Clerk.

954 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Bill of Exceptions of William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Be it remembered that the above entitled action is now and since the 12th day of October, 1904, has been pending in the above entitled Court, H. W. Prouty, Esq., and A. G. M. Robertson, Esq.,

appearing for and representing the said plaintiff, and Messrs. Castle & Withington, Smith & Lewis, and John W. Cathcart, Esq., appearing for and representing the said defendants;

Be it further remembered that the above entitled action came on regularly for trial in the above entitled Court on the 7th of May, A. D. 1908, before the Honorable J. T. De Bolt, Presiding, and a jury; that on the examination of the first witness called by the plaintiff upon the objection of the defendant executors to the introduction of any evidence in this cause on the ground of the mis-

joinder of defendants, Clinton J. Hutchins, Trustee, and
955 A. B. Wood, with the said defendant executors in the same action, the plaintiff discontinued said action as to defendants, Clinton J. Hutchins, Trustee, and A. B. Wood, and thereupon the Court ordered the trial to proceed as to the defendant executors;

And be it further remembered that during the pendency of said action, pleadings, motions, affidavits, etc., were filed, proceedings had and testimony taken in said action, and the following exceptions were duly taken and reserved by said defendants during the pendency of said action; and said defendants now present, serve and file said exceptions as contained in this Bill of Exceptions, and because of which they pray the reversal and annulment of the judgment herein.

956

Exception No. A.

That after the filing of the complaint in said action and before answer, said defendants duly filed in said action a plea in abatement, said plea in abatement being in words and figures as follows, to wit:

957 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January (1905) Term.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

VS.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Plea in Abatement.

Now come William Waterhouse and Albert Waterhouse, Executors of the Will of Henry Waterhouse, deceased, defendants in the above entitled action, and pray judgment of the plaintiff's bill of complaint filed in said action, and that the same be dismissed because they say that that certain Action in Replevin, commenced in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, wherein William W. Bierce, Limited, is plaintiff, and Clinton J. Hutchins, Trustee, is defendant, to recover from said defendant

certain property in the complaint in said action mentioned, and wherein the return bond on which said plaintiff seeks to recover in this action is alleged to have been given, was on or about the 21st day of March 1902, appealed to the Supreme Court of the Territory of Hawaii, and that said appeal has been perfected and 958 has not been dismissed, and is at the present time pending and undetermined before said Supreme Court.

That the obligation of said return bond alleged to have been given and made by said defendant Clinton J. Hutchins, Trustee, as principal, and Henry Waterhouse (whose executors said William Waterhouse and Albert Waterhouse are defendants herein,) and Arthur B. Wood, also defendant herein, are sureties, is only that if the said property and all thereof shall be well and truly delivered the said plaintiff, if said delivery be adjudged by said court, and pay such sums as may be recovered against said defendant Clinton J. Hutchins, Trustee, by judgment in said action, then this obligation to be void, otherwise to remain in full force and effect; that the said William W. Bierce, Limited, plaintiff in this action is not entitled to maintain this action on said return bond as alleged in said complaint in this action or at all, pending the aforesaid appeal to said Supreme Court, and that said action on said bond cannot be maintained until final judgment in that certain action wherein said return bond is alleged to have been given and made; and this the defendants are ready to verify.

Wherefore, the said defendants pray judgment of this Honorable Court whether they should be compelled to make any other or further answer to said complaint and that these defendants further pray that they be hence dismissed with their costs.

WILLIAM WATERHOUSE AND
ALBERT WATERHOUSE.

*Executors under the Will and of the Estate
of Henry Waterhouse, Deceased, Defendants,*

(Sig.) By SMITH & LEWIS, *Their Attorneys.*

959 TERRITORY OF HAWAII,
Island of Oahu, ss:

Albert Waterhouse, being first duly sworn, deposes and says that he is one of the Executors of the last Will of Henry Waterhouse, deceased, and one of the defendants in the above entitled action; that he has read the foregoing Plea to the Complaint of William W. Bierce, Limited, plaintiff in the above entitled action, and that all the matters and things alleged in said Plea are true.

(Sig.) ALBERT WATERHOUSE.

Subscribed and sworn to before me this 11th day of November 1904.

(Sig.) WM. J. FORBES,
*Notary Public, First Judicial
Circuit, Territory of Hawaii.*

[SEAL.]

Endorsed: L. 6023. Circuit Court, First Judicial Circuit, Territory of Hawaii. January (1905) Term. William W. Bierce, Limited, Plaintiff vs. Clinton J. Hutchins, Trustee, Arthur B. Wood; and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, Defendants. Plea in Abatement of William Waterhouse and Albert Waterhouse, Executors. Filed November 11, 1904, at 3:49 o'clock P. M. J. A. Thompson, Clerk. Service admitted, Kinney, McClanahan & Cooper, att'ys for [Def'ts.]* Plaintiff. Smith & Lewis Attorneys at Law, Judd Building Honolulu, T. H.

960 Said plea in abatement was by the court overruled, to which ruling of the court defendants duly excepted, and which said ruling is here and now assigned as error by said defendants.

961

Exception No. B.

That after the filing of the amended complaint in said action and before answer, said defendants duly filed a demurrer to said amended complaint, said demurrer being in words and figures as follows, to-wit:

962 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January (1905) Term.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Demurrer of Executors to Amended Complaint.

Now comes William Waterhouse and Albert Waterhouse, Executors of the last Will of Henry Waterhouse, deceased, defendants in the above entitled action, and demur to plaintiff's bill of complaint on file herein, and for grounds of complaint aver as follows:

L

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this, that it does not appear therein neither can it be ascertained therefrom wherein and whereby said plaintiff is entitled to maintain said action against said defendants William Waterhouse and Albert Waterhouse as such Executors.

[* Words enclosed in brackets erased in copy.]

II.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this, that it does not appear therein, neither can it be ascertained therefrom, 963 whether or not said action commenced by said plaintiff against said defendant Clinton J. Hutchins, Trustee, wherein judgment is alleged to have been rendered against said defendant Clinton J. Hutchins, Trustee, has been appealed to the Supreme Court of the Territory of Hawaii, or that said judgment is a final judgment.

III.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this, that no cause of action lies against said defendants William Waterhouse and Albert Waterhouse as such Executors, or against the Estate of said Henry Waterhouse, deceased.

IV.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this, that it appears from said complaint that judgment was rendered against said defendant Clinton J. Hutchins, Trustee, in the sum of twenty-two Thousand Dollars (\$22,000), which, it is alleged, was the value of the said property found by the Court, while it appears in the return bond attached to said complaint, and made a part thereof, that the value of the property specifically set forth in the bill of complaint filed in said suit and the affidavit filed therein, is the sum of Fifteen Thousand Dollars (\$15,00).

V.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this, that it appears from said complaint that said action in which said bond was 964 given was commenced before the Circuit Court of the Third Circuit, Territory of Hawaii; that said action was thereafter transferred from the said Circuit Court of the Third Circuit to the Circuit Court of the First Circuit, Territory of Hawaii; that it does not appear therein, neither can it be ascertained therefrom that the said Henry Waterhouse or his said Executors consented to said transfer.

VI.

That said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, said defendants William Waterhouse and Albert Waterhouse, Executors of the last Will of Henry Waterhouse, deceased,

pray judgment that plaintiff take nothing by this action, and that they, the said Executors, be hence dismissed with their costs.

(Sig.)

SMITH & LEWIS,

*Attorneys for said Defendants, William Waterhouse
and Albert Waterhouse, Executors under the Will
and of the Estate of Henry Waterhouse, Deceased.*

Endorsed: Law. 6023. Circuit Court, First Circuit, Territory of Hawaii, January, 1905, Term. William W. Bierce, Ltd., vs. Clinton J. Hutchins, Tr., A. B. Wood, Wm. Waterhouse & A. Waterhouse, Executors. Demurrer of Executors to Amended Complaint. Filed December 29, 1904, at 1 p. m. J. A. Thompson, Clerk. Smith & Lewis, Attorneys at Law, Judd Building, Honolulu, T. H. Due service by copy of the within demurrer is hereby admitted this 29th day of December, 1904. Kinney, McClanahan & Cooper, C. A. Galbraith, Attorneys for pl'ff.

965 Said demurrer was by the court overruled, to which ruling of the court defendants then and there duly excepted and said ruling is here and now assigned as error by said defendants.

966

Exception No. C.

Withdrawn by Defendants.

That on the 3rd day of January, 1905, said plaintiff filed a motion for a continuance of the trial of said action said motion being in words and figures as follows, to wit:

967 In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1906.

L. 6023.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, et al., Defendants.

Assumpsit.

Motion for Continuance.

Now comes William W. Bierce, Limited, plaintiff herein, by its attorney A. G. M. Robertson, and moves the Court here that the above entitled cause be continued till the next term of this Court.

This motion is based on the record herein, the affidavit of A. G. M. Robertson hereto attached and made part hereof; and also a copy of the petition for a writ of mandamus filed in the Supreme Court of the United States in the case of William W. Bierce, Limited,

vs. Clinton J. Hutchins, Trustee, and the petitioner's brief in support thereof, filed herewith.

Dated, Honolulu January 3, 1906.

WILLIAM W. BIERCE,
LIMITED,

(Sig.) By Its Attorney, A. G. M. ROBERTSON.

968 In the Circuit Court of the First Circuit, Territory of Hawaii,
January Term, 1905.

L. 6023.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, et al., Defendants.

Assumpsit.

Affidavit of A. G. M. Robertson.

TERRITORY OF HAWAII,

Island of Oahu, ss:

A. G. M. Robertson, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled cause; that the said action was instituted to recover damages for breach of condition in a certain redelivery bond given in an action of replevin entitled "William W. Bierce, Limited vs. Clinton J. Hutchins, Trustee"; heretofore tried in the above entitled court and reported in the decisions of the Supreme Court on exceptions therein taken in 16 Haw. 418, 717; that proceedings were promptly taken to have reviewed the said decisions by the Supreme Court of the United States, and said proceedings are now pending in the last mentioned Court, and as deponent is informed and believes, the source of his information being Henry W. Prouty, Esq., of Chicago, Ill., general counsel for the petitioner, that every proper endeavor is being made to secure an early hearing and determination thereof; that there

969 is no need or occasion why the above entitled cause should be tried at the present term of this Court, or pending the final determination of the proceedings referred to, because in the event of the judgment for defendant in said action of replevin being affirmed by the United States Supreme Court, this present action would be immediately discontinued, whereas if said Court should affirm the judgment heretofore rendered in and by the above entitled Court, in favor of the plaintiff, the plaintiff would be entitled to the protection of this present action upon said bond; that a trial of this action at this present term would necessitate further appeals to the local Supreme Court and to the Supreme Court of the United States, and entail the attendant expenses of such proceedings upon the government and the parties litigant unnecessarily.

(Sig.)

A. G. M. ROBERTSON.

Subscribed and sworn to before me this 3rd day of January,
A. D. 1906.

(Sig.)

JOB BATCHELOR,
Clerk Circuit Court, First Circuit.

Endorsed: L. 6023. Circuit Court, First Circuit, January Term, 1906. William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee, et al. Motion for Continuance. Filed January 3rd, 1906, at 3:40 P. M. Job Batchelor, Clerk. A. G. M. Robertson, Att'y for Plt'ff.

970 Said defendants objected to a continuance of the trial of said action, whereupon the court overruled said objection and granted said continuance, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

971 *Exception No. D.*

Withdrawn by Defendants.

That on the 4th day of April, A. D. 1906, said plaintiff moved for a further continuance of the trial of said action said motion for a continuance being in words and figures as follows, to wit:

972 In the Circuit Court of the First Circuit, Territory of Hawaii,
April Term, 1906.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, et als., Defendants.

Assumpsit.

Motion for Continuance.

Now comes William W. Bierce, Limited, plaintiff herein, by its attorney A. G. M. Robertson, and moves the Court here that the above entitled cause be continued till the next term of this Court.

This motion is based on the record herein; a copy of the petition for a writ of mandamus filed in the Supreme Court of the United States in the case of William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee, and the petitioner's brief in support thereof heretofore filed in this cause; the affidavit of A. G. M. Robertson hereto attached; and certified copies of a motion for a writ of supersedeas, affidavit in support thereof, and of the order of the Supreme Court of the United States, entered thereon, in the case of William W. Bierce, Limited, appellant vs. Clinton J. Hutchins, Trustee, No. 607, October Term 1905, as the same remain upon the files and records of said Supreme Court filed herewith; also upon the certified copy of the order of the Supreme Court of the United States made and

973 entered on the 4th day of December 1905, allowing the appeal in said case of William W. Bierce, Limited vs. Clinton J.

Hutchins, Trustee, and the bond of said appellant filed pursuant to said order, which constitute part of the records of the Supreme Court of this Territory in said cause, and which this movant asks leave to offer in evidence upon the hearing of this motion, all of which are offered and referred to in support of this motion and made part hereof.

Dated Honolulu, April 4th, 1906.

WILLIAM W. BIERCE, LIMITED,

(Sig.) By Its Attorney, A. G. M. ROBERTSON.

974

Affidavit.

TERRITORY OF HAWAII,

Island and County of Oahu, ss:

A. G. M. Robertson, being first duly sworn, deposes and says that he is the attorney for William W. Bierce, Limited, plaintiff in the above entitled cause; that the above entitled action was instituted to recover damages for breach of condition in a certain redelivery bond given by the defendants in an action of replevin entitled "William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee," heretofore tried in this Court and reported in the decisions of the Supreme Court of this Territory on exceptions taken in the trial thereof in 16 Haw. 418 and 717; that proceedings were promptly taken by the plaintiff to have the said decisions reviewed by the Supreme Court of the United States; that plaintiff's appeal in said cause has been duly allowed and a supersedeas issued by the Supreme Court of the United States, and the judgment therein has been superseded accordingly; that a complete transcript of the record in said cause has been completed, printed and filed in said Supreme Court, and the cause is in said Court now pending; and deponent is informed and believes that every proper endeavor is being made to secure an early hearing and determination thereof; that there is no need or occasion why the above entitled cause should be tried at the present term of this Court, or pending the final determination of the proceedings referred to because in the event of the judgment for defendant in said action of replevin being affirmed by the United States Supreme Court, this present action would be immediately discontinued, whereas if said court should affirm the judgment

heretofore rendered in and by the above entitled Court in
975 favor of the plaintiff, the plaintiff would be entitled to the protection of this present action upon said redelivery bond; that plaintiff was compelled for its own protection to institute this present action against the executors of the Estate of Henry Waterhouse, deceased, before the final determination of the appeal in said action of replevin by reason of the statute of limitations of this Territory in regard to the filing of claims against the estates of deceased persons; that a trial of this action at this present term of this Court would necessitate further appeals to the Supreme Court of this Territory and perhaps to the Supreme Court of the United States, and so entail the attendant expenses of such proceedings

upon the government and the parties litigant unnecessarily, and otherwise do injustice to the plaintiff.

(Sig.)

A. G. M. ROBERTSON.

Subscribed and sworn to before me this 4th day of April, A. D. 1906.

(Sig.)

WM. R. SIMS, *Clerk*.

Endorsed: Circuit Court, First Circuit. April Term, 1906. William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee, et als. Motion for Continuance. Filed Apr. 4th, 1906. Sims, Clerk. A. G. M. Robertson, Att'y for Pl't'ff.

976 Defendants objected to said motion whereupon the court granted the same, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

977

Exception No. E.

Withdrawn by Defendants.

That on the 5th day of September, A. D. 1906, said plaintiff made a further motion for a continuance of the trial of said action and for a stay of proceedings therein, said motion being in words and figures as follows, to wit:

978 In the Circuit Court of the First Circuit, Territory of Hawaii.

L. 6023.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM WATERHOUSE, —, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Motion for Continuance and Stay of Proceedings.

Now comes William W. Bierce, Limited, plaintiff in the above entitled cause, by its attorney, A. G. M. Robertson, and moves the court here that the said cause be continued till the next term of this Court, and that an order be made and entered herein staying further proceedings in said cause thereafter until the final disposition in and by the Supreme Court of the United States of the case now pending therein on appeal from the Supreme Court of the Territory of Hawaii, entitled William W. Bierce, Limited, appellant, vs. Clinton J. Hutchins, Trustee, appellee, No. 212 of the October Term A D. 1906.

This motion is based on the record herein, a copy of the petition for a writ of mandamus, filed in the Supreme Court of the United

States in the case entitled William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee, the petitioner's brief in support thereof, certified copies of a motion for a writ of supersedeas, affidavit in support thereof and of the order of the said Supreme Court entered thereon, and said entitled case, as the same remain upon the files and records of said court, heretofore filed herein; the certified copy of the order of the Supreme Court of the United States made and entered on the 4th day of December, 1905, allowing the appeal in said entitled cause, and the bond of the appellant filed pursuant to said order, which constitute part of the record and files of the Supreme Court of this Territory in said cause, and which this movant asks leave to offer in evidence upon the hearing of this motion, and asks that same, when received, be considered as part of this motion; a copy of the transcript of the record on appeal in said cause in the Supreme Court of the United States, filed herewith; and the affidavits of Henry W. Prouty and A. G. M. Robertson attached hereto; all of which are hereby referred to in support of this motion and made part hereof.

Dated Honolulu, September 5, 1906.

WM. W. BIERCE, LIMITED,

(Sig.) By its Attorney, A. G. M. ROBERTSON.

980 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, September Term, A. D. 1904.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

STATE OF ILLINOIS,

County of Cook, ss:

Henry W. Prouty, being first duly sworn, deposes and says that he resides in the City of Chicago, County of Cook and State of Illinois, and is and has been, in connection with the litigation hereinafter mentioned, the general attorney and counsel for William W. Bierce, Limited, which is a corporation created and existing by virtue of the laws of the State of Louisiana and the plaintiff in the above entitled cause, and that deponent makes this affidavit in its behalf and in support of the application it is about to make for an order of court continuing said cause and staying all further proceedings therein until after the final disposition or determination in and by the Supreme Court of the United States of the appeal hereinafter mentioned of said William W. Bierce, Limited.

Deponent further says that when the above entitled action was begun in said Circuit Court on or about the 11th day of October, A. D. 1904, the replevin suit of William W. Bierce, Limited, plaintiff, vs. Clinton J. Hutchins, Trustee, defendant mentioned in the

return bond sued on in the above entitled action, and for the
981 return of the property seized by the High Sheriff in which,
said replevin suit, and for the payment to said plaintiff of
such sum of money as might for any cause be recovered therein
against said defendant, the said bond was executed by the obligors
therein and accepted and approved by said High Sheriff in said re-
plevin suit, was pending and undetermined in the Supreme Court
of the Territory of Hawaii on the exceptions of the defendant
therein from said Circuit Court to its findings of fact and conclu-
sions of law made and of record therein, and in particular to the
judgment rendered therein on or about the 19th day of March, A. D.
1904, by said Circuit Court in favor of said plaintiff for the return
of the property in controversy therein by said defendant, or in de-
fault thereof, for the recovery by said plaintiff from said defendant
of the value of said property, therein found and adjudged by said
Circuit Court to be the sum of Twenty-two Thousand Dollars
(\$22,000.00), together with damages for the detention thereof by
said defendant, therein found and adjudged by said Circuit Court
to be the sum of Ten Hundred and Forty-five Dollars (\$1045.00),
together with said plaintiff's costs of said replevin suit, taxed at the
sum of Fifty Dollars and Fifty Cents (\$50.50), and that long subse-
quent to the commencement of the above entitled action on said re-
turn bond in said Circuit Court, and on or about the 28th day of
January, A. D. 1905, said Supreme Court of the Territory of Hawaii
rendered and filed a decision in said replevin suit sustaining the ex-
ceptions of said defendant therein so far as they raised the question
of election and reversing the judgment of said Circuit Court therein,
and that thereupon, on the 6th day of May, A. D. 1905, said Supreme

Court entered its final judgment in said replevin suit order-
982 ing and adjudging that the judgment rendered in said re-
plevin suit by said Circuit Court in favor of said plaintiff for
the return of the property in controversy therein, or in case the same
should not be returned, for the value thereof, found to be the sum
of Twenty-two Thousand Dollars (\$22,000.00) and interest thereon,
be reversed, and that said exceptions, in so far as they raise the ques-
tion of election, be sustained, and remanding said replevin suit to
said Circuit Court with directions to enter judgment for defendant
therein with costs, all as by the record of the proceedings taken and
had in said Circuit Court and in said Supreme Court of the Territory
of Hawaii will more fully and at large appear.

Deponent further says that said William W. Bierce, Limited, has
been greatly delayed in taking and prosecuting an appeal to the
Supreme Court of the United States from the final judgment so
entered in said replevin suit by the Supreme Court of said Territory
as aforesaid by the wrongful refusal of the Supreme Court of said
Territory to allow to it such appeal; that within ten days after said
judgment was entered, and on the 16th day of May, A. D. 1905,
said William W. Bierce, Limited, as the plaintiff in said replevin
suit, through its attorneys and counsel, by petition or motion in
writing, duly and regularly made application to the Supreme Court
of said Territory, in accordance with the rules and procedure thereof

for the allowance to it of an appeal from said Judgment to the Supreme Court of the United States, which said application was duly presented in open Court and argued by counsel for the respective parties and heard by the Supreme Court of said Territory, which on said 16th day of May, A. D. 1905, denied said application for an appeal; that a like application for the allowance of such appeal was likewise made to the Supreme Court of said Territory by counsel

for said William W. Bierce, Limited, and in its behalf, on 983 the 6th day of June, A. D. 1905, and again on the 22nd day of June, A. D. 1905, which said two last mentioned applications were likewise respectively denied by the Supreme Court of said Territory on the two dates last hereinabove mentioned respectively, as by the record of said proceeding remaining in said court more fully and at large appears; that thereupon said William W. Bierce, Limited, promptly applied to the Clerk of the Supreme Court of said Territory for a true, correct and complete authenticated transcript of the record of said court in said replevin suit for the purposes of its application to the Supreme Court of the United States next hereinafter mentioned, which transcript was thereupon prepared by said Clerk, his certificate thereto under the seal of said court bearing date the 29th day of July, A. D. 1905; that said transcript was promptly shipped from Honolulu to this deponent in the City of Chicago aforesaid, and received by him on or about the 17th day of August, A. D. 1905, and was thereupon printed under his supervision for use in the Supreme Court of the United States; that thereupon said William W. Bierce, Limited, promptly and diligently made application to the Supreme Court of the United States to issue its writ of mandamus directed to the Honorable Chief Justice and Associate Justices of the Supreme Court of said Territory, or in the alternative, a writ of certiorari, to enforce the allowance to it of an appeal from the final judgment of the Supreme Court of said Territory in said replevin suit to the Supreme Court of the United States, by petition therefor in the nature of a petition for the allowance of an appeal, which said petition with its brief in support thereof and motion for leave to file the same, together with said original transcript of the record in said replevin suit and the requisite number of printed copies of said petition, brief, motion and record,

984 were by counsel for said William W. Bierce, Limited, regularly presented in the Supreme Court of the United States on Monday the 27th day of November, A. D. 1905, and that upon consideration thereof by the Supreme Court of the United States, thereafter, on Monday, the 4th day of December, A. D. 1905, an order was made and entered in said cause by the Supreme Court of the United States granting to said petitioner, William W. Bierce, Limited, leave to file said petition, and on consideration thereof and of the record presented therewith, allowing said petitioner an appeal from the judgment of the Supreme Court of said Territory in said replevin suit to the Supreme Court of the United States on the appellant giving bond in the penal sum of One Thousand Dollars (\$1000.00), conditioned according to law, and approved by the

Chief Justice of the Supreme Court of said Territory or an associate justice thereof.

Deponent further says that promptly thereafter he proceeded as such counsel for said William W. Bierce, Limited, to perfect the appeal so allowed to it in said replevin suit by procuring a certified copy of said order allowing said appeal and causing the same to be filed in the Clerk's Office of the Supreme Court of said Territory together with an appeal bond in the penal sum of One Thousand Dollars (\$1000.00) properly executed by said William W. Bierce, Limited, as principal, and by sufficient surety, conditioned according to law, which said bond was approved by the Honorable W. F. Frear, Chief Justice of the Supreme Court of said Territory, as provided by said order, and together with said appellant's assignment of errors, which said certified copy of order, appeal bond and assignment of errors were so filed on the 13th day of January, A. D. 1906, and by causing a citation to be issued on the 13th day of January, A. D.

1906, signed by said Chief Justice of the Supreme Court of said Territory directed to said Clinton J. Hutchins, Trustee, commanding him to be and appear at a Supreme Court of the United States at Washington, within sixty days from the date thereof, pursuant to said order allowing said appeal, to show cause, if any there be, why the judgment rendered against said appellant by the Supreme Court of said Territory in said replevin suit should not be corrected, and why speedy justice should not be done to the parties in that behalf, service of a copy of which said citation was duly admitted by Messrs. Castle & Withington, attorneys for said appellee, by indorsement thereon bearing date the 13th day of January, A. D. 1906, and by causing a true, correct and complete authenticated transcript of the record of the Supreme Court of said Territory in said replevin suit, certified by the Clerk thereof under date of the 16th day of January, A. D. 1906, with the seal of said court affixed to his certificate, and said original citation thereto attached and the requisite number of printed copies of said record to be filed in the office of the Clerk of the Supreme Court of the United States on the 27th day of February, A. D. 1906, and by causing said appeal to be docketed therein the same day and year last aforesaid as the case of William W. Bierce, Limited, a corporation, Appellant, vs. Clinton J. Hutchins, Trustee, Appellee, No. 607, of the October Term, A. D. 1905.

Deponent further says that immediately thereafter, and on the 28th day of February, A. D. 1906, said William W. Bierce, Limited, through its counsel, applied to the Supreme Court of the United States in said cause by written motion supported by the affidavit of William W. Bierce subscribed and sworn to on the 24th day of February, A. D. 1906, to order a writ of supersedeas to issue therein superseding the said final judgment of the Supreme Court of said

Territory in said replevin suit appealed from therein, and

986 that upon consideration thereof the Supreme Court of the United States thereafter, and on the 6th day of March, A. D. 1906, entered an order in said cause ordering said appeal bond already given therein to operate as a supersedeas superseding said judg-

ment accordingly, a certified copy of which said motion and affidavit for supersedeas, and of the said supersedeas order entered thereon, is herewith submitted to the court.

Deponent further says that said application for supersedeas was founded wholly upon the record of the Supreme Court of said Territory in said cause and said affidavit of William W. Bierce, and said supersedeas was awarded by the Supreme Court of the United States solely upon a consideration thereof, and not otherwise, and that said supersedeas was both sought by said appellant and awarded by said court in order to prevent the great loss to said appellant and deprivation of its rights which might ensue in the event that the above entitled action on said return bond should be forced to trial prematurely, or before the determination of said appeal in the Supreme Court of the United States, for the reason that the bar of the statute of limitations of said Territory long ago became complete against the commencement and maintenance of another action on said bond (in case the said action now pending thereon should be dismissed) against the executors under the will of said Henry Waterhouse, the deceased surety thereon and for the further reason that the surviving obligors on said bond would not be financially responsible for the amount of said plaintiff's damages arising from a breach of the conditions thereof.

Deponent further says that not only have said William W. Bierce, Limited, its directors, officers, attorneys and counsel never delayed said replevin suit and never sought delay therein but on the contrary each and all of them have at all times in taking all the
987 steps and proceedings had and taken therein as aforesaid, used and exercised the utmost promptness and speed, and at all times and on all occasions have applied their best and utmost efforts with unremitting diligence to the taking of each of said steps and proceedings, to the end of procuring such appeal to be allowed to said William W. Bierce, Limited, with the minimum loss of time, and of prosecuting the same with the utmost diligence when allowed.

Deponent further says that despite the exercise of such diligence the said cause was docketed for appeal in the Supreme Court of the United States so late in the October Term of said court in the year 1905, namely, on the 27th day of February, A. D. 1906, that the same fell far short of being reached for argument and hearing by said court on the regular call of its docket for said term, and further, that said cause is not of such a nature as would permit it to be advanced for hearing on the docket of said court in accordance with the rules of said court, by reason whereof, and for no other reason known to this deponent, said cause was not heard or disposed of by said court at the October Term thereof in the year 1905 but still remains pending and undetermined in said court, and will stand for hearing in its regular order on the docket for the October Term of said court in the year 1906.

Deponent further says that said appellant, its attorneys and counsel are doing all things essential to prepare said cause for hearing when the same shall be reached for that purpose in its regular order

on the call of the docket of said court for the October Term thereof in the year 1906, and will not delay in any way such hearing.

And further deponent saith not.

(Sig.)

HENRY W. PROUTY.

Subscribed and sworn to before me this 14th day of August, A. D. 1906.

[SEAL.]

(Sig.)

AARON C. HARFORD,
Notary Public.

988 STATE OF ILLINOIS,
Cook County, ss:

I, Peter B. Olsen, County Clerk of the County of Cook, do hereby certify that I am the lawful custodian of the official record of Notaries Public of said County, and as such officer am duly authorized to issue certificates of magistracy, that Aaron C. Harford whose name is subscribed to the annexed Jurat, was, at the time of signing the same, a Notary Public, in Cook County, duly commissioned, sworn and acting as such, and authorized to administer oaths, and to take acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments, in said State of Illinois, all of which appears from the records and files in my office; that I am well acquainted with the handwriting of said Notary, and verily believe that the signature to the said Jurat is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the County of Cook at my Office in the City of Chicago, in the said County this 14 day of August 1906.

[SEAL.]

(Sig.)

PETER B. OLSEN,
County Clerk.

989 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, September Term, A. D. 1904.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

STATE OF ILLINOIS,
County of Cook, ss:

Henry W. Prouty, being first duly sworn, deposes and says that for the purpose of learning when the appeal of said William W. Bierce, Limited, from the final judgment of the Supreme Court of the Territory of Hawaii in the replevin suit mentioned and described in this deponent's affidavit heretofore made in the above entitled cause and subscribed and sworn to on the 14th day of August, A. D. 1906, which said appeal was docketed in the Supreme Court of

the United States on the 27th day of February, A. D. 1906, as the case of William W. Bierce, Limited, a corporation, Appellant, vs. Clinton J. Hutchins, Trustee, Appellee, No. 607, of the October Term, A. D. 1905 and is still pending and undetermined therein, probably would be reached for hearing by the Supreme Court of the United States on the regular call of its docket for the October Term in the year 1906, he, this deponent, at his law office in the City of Chicago, Illinois, did heretofore, on the 10th day of August, A. D.

1906, write and send by United States mail, and in the usual
990 course of such mail, a certain letter of that date addressed to James H. McKenney, Esq., Clerk of the Supreme Court of the United States, Washington, D. C. a correct and true letter-press copy of which said letter made before the same was sent and since cut out of this deponent's letter-press copying book, is hereunto attached, marked Exhibit "A" and made a part of this affidavit.

Deponent further says that in answer to said letter he has at his said office on this, the 15th day of August, A. D. 1906, received from the Clerk of the Supreme Court of the United States, by United States mail, and in the usual course of such mail, a certain letter, which is hereunto attached, marked Exhibit "B" and made a part of this affidavit.

Deponent further says that he makes this affidavit in behalf of said William W. Bierce, Limited, and in support of the application it is about to make to the Honorable the Circuit Court of the First Judicial Circuit of the Territory of Hawaii for an order of court continuing the above entitled action of assumpsit and staying all further proceedings therein until after the final disposition or determination in and by the Supreme Court of the United States of the appeal hereinabove mentioned of said William W. Bierce, Limited.

And further deponent saith not.

(Sig.)

HENRY W. PROUTY.

Subscribed and sworn to before me, this 15th day of August, A. D. 1906.

(Sig.)

AARON C. HARFORD,

[SEAL.]

Notary Public.

STATE OF ILLINOIS,

Cook County, ss:

I, Peter B. Olsen, County Clerk of the County of Cook, do hereby certify that I am the lawful custodian of the official record of Notaries Public of said County and as such officer am duly authorized to issue certificate of magistracy, that Aaron C. Harford whose name is subscribed to the annexed Jurat, was, at the time of signing the same, a Notary Public in Cook County, duly commissioned, sworn and acting as such, and authorized to administer oaths, and to take acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments, in said State of Illinois, all of which appears from the records and files in my office;

that I am well acquainted with the handwriting of said Notary, and verily believes that the signature to the said Jurat is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the County of Cook at my Office in the City of Chicago, in the said County this 15 day of August, 1906.

(Sig.)
[SEAL.]

PETER B. OLSEN,
County Clerk.

992

EXHIBIT "A."

AUGUST 10, 1906.

James H. McKenney, Esq., Clerk of the Supreme Court of the United States, Washington, D. C.

DEAR SIR: Referring to the case of William W. Bierce, Ltd., Appellant, vs. Clinton J. Hutchins, Trustee, Appellee, No. 607, October Term, 1905, pending in the Supreme Court of the United States, will you be good enough to advise me, if possible, by return mail what is, or will be, the number of this case on the docket of the court for the October Term, 1906, and what is the probability in your opinion of the case being reached for argument or hearing by the court prior to April 1, 1907, on the regular call of the docket.

Thanking you in advance for the courtesy of a prompt answer to the above inquiry, I am,

Very respectfully yours,
(Sig.)

H. W. PROUTY.

993

WASHINGTON, D. C., August 13, 1906.

H. W. Prouty, Esq., Chicago, Ill.

DEAR SIR: YOURS of the 10th inst., received.

Case of William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee, No. 212, Oct. Term, 1906, will probably be reached for hearing some time during the month of March, 1907.

Yours truly,

JAS. H. MCKENNEY,
Clerk, Supreme Court, U. S.
Per H. C. M.

Received Aug. 15, 1906.

H. W. PROUTY.

EXHIBIT "B."

994

Affidavit.

TERRITORY OF HAWAII,

Island and County of Oahu, ss:

A. G. M. Robertson, being first duly sworn, deposes and says that he is the attorney for William W. Bierce, Limited, plaintiff in the above entitled cause; that the above entitled action was instituted to recover damages for breach of condition in a certain redelivery

bond given by the defendants in an action of replevin entitled "William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee," heretofore tried in this Court and reported in the decisions of the Supreme Court of this Territory on exceptions taken in the trial thereof in 16 Haw. 418 and 717; that proceedings were promptly taken by the plaintiff to have the said decisions reviewed by the Supreme Court of the United States; that plaintiff's appeal in said cause has been duly allowed and a supersedeas issued by the Supreme Court of the United States, and the judgment therein has been superseded accordingly; that a complete transcript of the record in said cause has been completed, printed and filed in said Supreme Court, and the cause is in said Court now pending; and deponent is informed and believes that every proper endeavor is being made to secure an early hearing and determination thereof; that there is no need or occasion why the above entitled cause should be tried at the present term of this Court, or pending the final determination of the proceedings referred to because in the event of the judgment for defendant in said action of replevin being affirmed by the United States Supreme Court, this present action would be immediately discontinued, whereas if said court should affirm the judgment heretofore rendered in and by the above entitled court in favor of the plaintiff, the plaintiff would be entitled to the protection of this present action upon said redelivery bond; that

995 plaintiff was compelled for its own protection to institute this present action against the executors of the Estate of Henry Waterhouse, deceased, before the final determination of the appeal in said action of replevin by reason of the statute of limitations of this Territory in regard to the filing of claims against the estates of deceased persons; that a trial of this action at this present term of this Court would necessitate further appeals to the Supreme Court of this Territory and perhaps to the Supreme Court of the United States, and so entail the attendant expenses of such proceedings upon the government and the parties litigant unnecessarily, and otherwise do injustice to the plaintiff.

(Sig.)

A. G. M. ROBERTSON.

Subscribed and sworn to before me this 5th day of September, A. D. 1906.

(Sig.) R. W. ATKINSON,

[SEAL.]

Notary Public, 1st Judicial Circuit.

Endorsed: L. 6023. Circuit Court, First Circuit. William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee, et al. Motion for Continuance and Stay of Proceedings. Filed September 5th, 1906, at 2:30 p. m. L. P. Scott, Clerk. A. G. M. Robertson, Att'y for Pl'tff. Service of a copy of the within motion is hereby acknowledged this 5th day of September, 1906. Castle & Withington, Attorneys for C. J. Hutchins, Tr. Smith & Lewis, Attorneys for A. B. Wood and William Waterhouse Executors of the Will of Henry Waterhouse, deceased.

996 Defendants objected to the granting of said motion for a continuance, and in support of said objection filed an affidavit in opposition to said motion, said affidavit being in words and figures as follows, to wit:

997 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January, 1905, Term.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

VS.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Affidavit in Opposition to Motion for Continuance.

TERRITORY OF HAWAII,

Island of Oahu, ss:

A. Lewis, Jr., being first duly sworn deposes and says:

That he is a member of the firm of Smith & Lewis, Attorneys for Defendants Arthur B. Wood; and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, Defendants in the above entitled action; that proceedings have not been promptly taken by Plaintiff in the replevin case of William W. Bierce, Limited, vs. Clinton J. Hutchins, No. 5782; that said action is being unnecessarily delayed and prejudicial to the rights of Defendants Arthur B. Wood; and William Waterhouse and Albert Waterhouse, Executors under the Will and of the

998 Estate of Henry Waterhouse, deceased; that final judgment was rendered in the Supreme Court of the Territory of Hawaii in said replevin suit on May 6th, 1905; that the first papers filed in the Supreme Court of the United States in said replevin suit were entered February 28th, 1906; that no papers showing that any proceedings had been taken to obtain a writ of

supersedeas
W. R. S. [error]* in said United States Supreme Court in said replevin suit were filed in the Territorial Supreme Court until March 23rd, 1906. That said Defendants Arthur B. Wood; and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, as sureties on the replevin bond are entitled to immediate trial and a determination of any possible claims under said replevin bond given July 21st, 1903.

(Sig.)

A. LEWIS, JR.

Subscribed and sworn to before me this 6th day of April, 1906.

(Sig.) GEORGE LUCAS,

*Clerk of the Circuit Court of the
First Judicial Circuit, Territory of Hawaii.*

[* Word enclosed in brackets erased in copy.]

Endorsed: Circuit Court, First Circuit, Territory of Hawaii. January, 1905, Term. William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee, Arthur B. Wood; William Waterhouse & Albert Waterhouse, Executors, s-c. Affidavit in Opposition to Motion for Continuance. Filed April 6, 1906, at 9:20 A. M. George Lucas, Clerk. Smith & Lewis, Attorneys at Law, Judd Bldg., Honolulu, T. H.

999 Whereupon the court overruled said objection to said motion and granted said motion for a continuance, to which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

1000 *Exception No. F.*

That on the 6th day of September, A. D. 1906, said defendants moved the court for an order setting said action for trial, said motion being preceded by a notice thereof in writing, said notice being in words and figures as follows, to wit:

1001 In the Circuit Court of the First Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

v.

CLINTON J. HUTCHINS, Trustee; A. B. WOOD, WILLIAM WATERHOUSE and Albert Waterhouse, Executors under the Will of Henry Waterhouse, Deceased, Defendants.

Notice of Motion to Set Cause of Trial.

To William W. Bierce, Limited, Plaintiff in the above entitled action, and to A. G. M. Robertson, Esquire, its Attorney:

You, and each of you, will please take notice that on Thursday, the 6th day of September, 1906, at 9:30 A. M. of said day, the De- To William W. Bierce, Limited, Plaintiff in the above entitled action, Court for an order setting the above entitled case for trial. Said motion will be based upon the motion and the pleadings, records and files of said action.

(Sig.)

SMITH & LEWIS,

*Attorneys for A. B. Wood, William Waterhouse
and Albert Waterhouse, Executors under the
Will of Henry Waterhouse, Deceased.*

(Sig.)

CASTLE & WITHINGTON,

Attorneys for Clinton J. Hutchins, Trustee.

Receipt of copy of within Notice is hereby admitted this 4th day of September, 1906.

(Sig.)

A. G. M. ROBERTSON,

Attorney for Plaintiff.

Endorsed: L. 6023. Circuit Court, First Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff v. Clinton J. Hutchins, Trustee, A. B. Wood, William Waterhouse and Albert Waterhouse, Executors under the Will of Henry Waterhouse, deceased, Defendants. Notice of Motion to set Cause of Trial. Dated September 4, 1906. Filed Sept. 4, 1906 4 P. M. M. T. Simonton, Clerk. Smith & Lewis, Attorneys at Law, Judd Building, Honolulu, T. H.

1002 Whereupon the court denied said motion to set said action for trial and refused to set the same down for trial, to which ruling of the court said defendants then and there duly excepted, which said ruling is here and now assigned as error by said defendants.

1003

Exception No. 1.

Transcript of Evidence, pp. 5, 6, 7, 8.

Upon the trial of said action the plaintiff offered in evidence a complaint in a certain action theretofore pending in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, wherein William W. Bierce, Limited, was plaintiff and Clinton J. Hutchins, Trustee, was defendant, being law #5782 and denominated Exhibit "A."

Whereupon defendants objected to the introduction of said complaint or to its being read in evidence, unless the same was read or considered as read with all of the interlineations contained therein and the portions stricken from said complaint, said complaint with the interlineations, erasures, etc., being in words and figures as follows, to wit:

1004 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

(\$2.00 Stamps.)

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Complaint.

Now comes William W. Bierce Limited, plaintiff herein, by its attorneys Kinney & McClanahan, and complains of Clinton J. Hutchins Trustee and for cause of action shows:

1.

That plaintiff is a corporation duly organized and existing under

the laws of the state of Louisiana and having its principal place of business in the city of Chicago in the State of Illinois.

2.

That the defendant is a resident of Honolulu, Island of Oahu, Territory of Hawaii, and a citizen of the said Territory of Hawaii.

3.

That on or about February 21st A. D. 1900 the said plaintiff agreed to furnish to the Kona Sugar Co. Ltd., a corporation duly organized and existing under the laws of the Territory of Hawaii, certain rails, engines, cars and other goods and merchandise for use on the plantation of the said Kona Sugar Co. Ltd. in the District of Kona, Island and Territory of Hawaii, at prices specified in the said agreement, which prices the said Kona Sugar Co. Ltd. agreed in writing to pay in cash upon the presentation of a demand draft attached to the bill of lading issued by the initial railroad, showing the said goods and merchandise to have been shipped through to the city of Honolulu, Island of Oahu, Territory of Hawaii.

4.

That in pursuance of the said agreement said plaintiff proceeded to ship the articles mentioned in said agreement to said Honolulu; that upon shipment of said goods and merchandise demand was made upon the said Kona Sugar Co. Ltd. for the payment of the price thereof in accordance with the terms of the agreement before mentioned. That the said Kona Sugar Co. Ltd., failed, neglected and refused to pay the said price or any part thereof; that because of this said failure on the part of the Kona Sugar Co. Ltd., the said goods and merchandise were not upon their arrival at said Honolulu nor at any other time, save as hereinafter mentioned, delivered to the said Kona Sugar Co. Ltd., nor was the title to said goods and merchandise or the right of property therein or the title or right of property of or in any part thereof ever transferred or taken from plaintiff, but that plaintiff retained both the title and possession and the right to the possession of the said goods and merchandise and each and all of them and every part thereof, and refused to permit them to pass into the possession of the said Kona Sugar Co. Ltd., except as hereinafter stated, nor did they or any of them in fact pass into the possession of the Kona Sugar Co. Ltd., except as hereinafter stated.

5.

said agreement of February 21, 1900, was adjusted and settled by contract in writing

That thereafter, to wit on or about March 13th, 1901, [^] [a supplementary contract in writing was]* entered into between the said

[* Words enclosed in brackets erased in copy.]

William W. Bierce, Ltd., and the said Kona Sugar Co. Ltd., whereby the said William W. Bierce, Ltd., offered in writing to permit the said Kona Sugar Co. Ltd., to take possession of the said rails, engines, cars and other goods and merchandise mentioned and to use the same upon the payment of \$10,000.00 Gold Coin to the said William W. Bierce, Ltd., and the execution of a promissory note by the said Kona Sugar Co. Ltd., to the said William W. Bierce, Ltd., for \$37,044.53, payable six months from date, upon the express condition, understanding and agreement that the said goods and merchandise should not become the property of the said Kona Sugar Co. Ltd., until the payment of the said note; which said offer and each and all of the terms and conditions thereof were accepted in writing by the said Kona Sugar Co. Ltd., upon the 13th day of March, A. D. 1901 and a promissory note for \$37,044.53 payable six months after date to the order of William W. Bierce, Ltd. was duly executed and delivered by the said Kona Sugar Co. Ltd., to the said William W. Bierce Ltd. Copies of said contract and note, marked respectively Exhibit "A" and Exhibit "B" are hereto attached referred to and made a part hereof.

Amendment allowed by the court this 7th day of M'ch, 1904.—P. D. Kellett, Jr., Clerk.

6.

1007 That thereafter in accordance with the terms of said [supplementary]* contract ^{of March 13th, 1900,} A but not otherwise, the said William W. Bierce Ltd. permitted the said Kona Sugar Co. Ltd. to take possession of and the said Kona Sugar Co. Ltd. did in fact take possession of the following goods and merchandise, to-wit:

Amendment allowed by the court this 7 day of March, 1904.—P. D. Kellett, Clerk.

plementary]* contract A but not otherwise, the said William W. Bierce Ltd. permitted the said Kona Sugar Co. Ltd. to take possession of and the said Kona Sugar Co. Ltd. did in fact take possession of the following goods and merchandise, to-wit:

chandise, to-wit:

- 362 tons of steel T. rails weighing 35 lbs. to the yard.
- Joints for laying 550 tons of Steel T. Rails.
- Railroad track spikes to law 550 tons of said rails.
- 10 sets of 35 lb. split switch material, complete.
- 16 cars, 25 feet long, 7 feet wide for 3 ft. gauge track.
- One 9 x 14 Class "A" saddle tank locomotive
- One 10 x 16 back saddle tank locomotive
- One Howe narrow gauge track scale, capacity 25 tons
- One set re-railers
- Four track gaugers, 3 feet
- One rail bender
- One track drill
- One section car with seats
- Two Jacks

Which said rails, cars, engines and other goods and merchandise as above enumerated were then and continued to be the property of the said William W. Bierce Ltd.; that the said Kona Sugar Co. Ltd.,

[* Words enclosed in brackets erased in copy.]

failed upon September 13th, 1901, said date being six months from the date of the execution of the promissory note mentioned to pay the said note or the sum therein mentioned or any part thereof, now has it the said Kona Sugar Co. Ltd. at any time since said date nor at any time, though thereto often requested by plaintiff, paid the said note or the sum therein mentioned or any part thereof 1008 nor had any third person for or on behalf of the said Kona Sugar Co. Ltd. or otherwise paid the said note or the sum therein mentioned or any part thereof.

7.

That from the date of said [supplementary]* contract ^{of March 13th, 1901} [^] and up to the 1st day of June A. D. 1903, the aforesaid property was at all times in the possession and control of the Kona Sugar Co. Ltd. or the receivers of the said Kona Sugar Co. Ltd. duly appointed. Amendment allowed by the Court this 7 day of M'ch, 1904.—P. D. Kellett, Jr., Clerk.

8.

That on or about the 1st day of April, A. D. 1903, the Honorable W. S. Edings, Judge of the Circuit Court of the Third Circuit, sitting at Chambers in Equity, in that certain case of R. W. McChesney et al. vs. The Kona Sugar Co. Ltd. et al. ordered F. L. Dortch, then Receiver of the Kona Sugar Co. Ltd. to sell all the property, both real and personal of the said Kona Sugar Co. Ltd.; that in pursuance of the said order the said F. L. Dortch proceeded to offer for sale and on the 9th day of May A. D. 1903, did sell the property of the Kona Sugar Co. Ltd., aforesaid, but that the said F. L. Dortch did not and could not sell the rails, cars, engines and goods and merchandise hereinabove more particularly described for the reason that the same were then and now are the property of William W. Bierce Ltd., Plaintiff herein.

9.

That at the said sale of the property of the Kona Sugar Co. Ltd. the defendant, C. J. Hutchins Trustee became the purchaser 1009 of the said property of the Kona Sugar Company Ltd.; That on June 1st A. D. 1903 the Honorable W. S. Edings, Judge of the Circuit Court of the Third Circuit sitting at Chambers in Equity made an order confirming the said sale; and that thereupon the defendant proceeded to and did take possession of all the property, real and personal, belonging to the Kona Sugar Co. Ltd.

10.

That the said defendant in addition to taking possession of the property of the Kona Sugar Co. Ltd. also took possession and control of the rails, engines, cars and other goods and merchandise hereinbefore more particularly described, belonging to plaintiff, and still

[* Words enclosed in brackets erased in copy.]

retains possession and control of the same which said taking and retaining of the possession of the said rails, engines, cars and the other goods and merchandise hereinbefore more particularly described were unlawful and in contravention of the rights of plaintiff under the law.

11.

That the said rails, cars, engines and goods and merchandise hereinbefore more particularly described have been at all times mentioned in this complaint and now are the property of plaintiff and it has been and still is the true and lawful owner thereof and is entitled to the exclusive and immediate possession thereof.

12.

That the said William W. Bierce Ltd. has demanded of said defendant the return of all and singular the property aforesaid; but that said defendant has failed neglected and refused and still fails, neglects and refuses to return the said property or any portion thereof; that the said property was wrongfully taken and
1010 now is wrongfully detained by said defendant contrary to the rights of plaintiff herein; that the said property was taken by defendant and is now detained by defendant in the District of Kona, Island and Territory of Hawaii, and within the jurisdiction of this Honorable Court.

13.

That the said property has not been taken for a tax assessment or pursuant to a statute or seized under an execution or an attachment against the property of the plaintiff.

14.

That the actual value of the
Twenty-two
said property is [Fifteen]* Thou-
sand Dollars [Thousand Dollars
(\$15,000.00)].*
Amendment allowed by the
Court this 7th March, 1904.
P. D. Kellett, Clerk.

Amendment allowed by the court by substituting \$22,000. for \$20,000 this 19th of M'ch 1904.

P. D. KELLETT, JR., Clerk.

Wherefore Plaintiff prays:

1. That the process of this Court may issue summoning the said defendant to appear and answer this complaint before a jury of the country at the December 1903 Term of this Honorable Court, unless sooner disposed of by judicial authority.

2. That plaintiff may have judgment for the return of all and

[* Words and figures enclosed in brackets erased in copy.]

singular the said property together with damages of its taking and detention and the costs of this action.

WILLIAM B. BIERCE, LIMITED,
By KINNEY & McCLANAHAN,
Its Attorneys.

E. B. M.

Dated Honolulu July 20th 1903.

1011 HONOLULU, OAHU,
Territory of Hawaii, ss:

E. B. McClanahan being first duly sworn on oath deposes and says:

That he is a member of the firm of Kinney & McClanahan, attorneys for William W. Bierce Ltd., above-named plaintiff: That William W. Bierce Ltd. is a foreign corporation doing business without the Territory of Hawaii, that Kinney & McClanahan are their representatives of William W. Bierce Ltd. in this jurisdiction, that he has read the foregoing complaint and knows the contents thereof and that the matters and things set forth therein are true to the best of his knowledge and belief.

(Signed)

E. B. McCLANAHAN.

Subscribed and sworn to before me this 20th day of July, A. D. 1903.

[SEAL.]

(Signed)

GUSSIE H. CLARK,
Notary Public, First Judicial Circuit.

EXHIBIT "A."

HONOLULU, H. T., March 13, 1901.

Kona Sugar Company, Limited, Honolulu, H. I.

Amendment allowed by the court this 7th day of March, 1904. P. D. Kellett, Jr., Clerk.

GENTLEMEN: In pursuance of the Verbal agreement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract be-

tween the Kona Sugar Company Limited and William W. Bierce Limited as evidence- by letter dated February 21, 1900, and accepted by the Kona Sugar Company, Limited, Feb. 22, 1900. We will take in settlement of this contract the sum of \$10,000.00, U. S. Gold Coin, and the promissory note of the Kona Sugar Company Limited for the sum of \$37,044.53, in favor of William W. Bierce, Ltd., payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company Limited of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding \$200,000. This offer is conditioned upon its acceptance by you payment of the money and the delivery

of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us, before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Very truly yours,

W. W. BIERCE, LTD.,
By H. T. GILBERT.

The above terms are accepted this March 13, 1901.

THE KONA SUGAR CO., LTD.

By Its President, J. M.

[SEAL.]

[F. W.] McCHESNEY.

By Its Treasurer, F. W. McCHESNEY.

1013 Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy-six (76) \$500. Bonds of the Kona Sugar Co. Numbered from 1 to 76 both inclusive.

W. W. BIERCE, LTD.,
By H. T. GILBERT.

EXHIBIT "B."

\$37044.53.

HONOLULU, H. I., March 13, 1901.

Six months after date we promise to pay to the order of Wm. W. Bierce Limited, at the Whitney National Bank of New Orleans, La., U. S. A. the sum of Thirty seven Thousand and Forty-four Dollars and 53/100 (\$37,044.53) with interest at the rate of seven and one-half per cent per annum until paid both principal and interest payable in Gold Coin of the United States.

Secured by bonds of the Kona Sugar Co. of the nominal value of Thirty Eight Thousand Dollars \$38000—(Seventy Six Bonds of the value of \$500.00 each numbered from 1 to 76 both numbers inclusive.)

THE KONA SUGAR CO., LTD.,

By Its President, J. M. McCHESNEY,
By Its Treasurer, F. W. McCHESNEY.

(Indorsed:) Pay to the order of Harry T. Gilbert.

Wm. W. Bierce, Limited,
By Wm. W. Bierce, Pre'd't.

1014 W. W. Bonden,
Sec't'y & Treas.
Wm. W. Bierce, Ltd.,
W. W. Bonden,
Sec't'y & Treas.
(Stamps.)

Harry T. Gilbert,
Wm. W. Bierce, Ltd.,
By C. Bierce, V.-Pres't.

(Endorsed:) Circuit Court Third Circuit Territory of Hawaii
Wm. W. Bierce Ltd. Plaintiff vs. Clinton J. Hutchins Trustee De-
fendant. Replevin Rec'd 33.00 J. P. Curts Kinney & McClana-
han Honolulu Attorneys for Plaintiff.

1015 The Court thereupon overruled said objection and received
said complaint in evidence, to which ruling of the Court the
defendants then and there duly excepted, and said ruling is here and
now assigned as error by said defendants.

Exception No. II.

Transcript of Evidence, pp. 8, 9, 10, 11, 12.

Thereafter plaintiff offered in evidence a return bond in a certain
action theretofore pending in the Circuit Court of the First Judicial
Circuit, Territory of Hawaii, wherein William W. Bierce, Limited,
was plaintiff and Clinton J. Hutchins, Trustee, was defendant, said
return bond being in words and figures, as follows, to wit: Denomi-
nated Exhibit "B."

1016 Circuit Court, Third Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
v.
CLINTON J. THUCHINS, Trustee.

(\$1.00 Stamp.)

Replevin.

Return Bond.

Know all men by these presents:

That we Clinton J. Hutchins, Trustee, as principal and Henry
Waterhouse and Arthur B. Wood, as sureties are held and firmly
bond unto William Bierce Company, Limited, its successor or
successors and assigns in the sum of Thirty Thousand (30,000) Dol-
lars, for the payment of which well and truly to be made, we bind
ourselves, our successors, herein and administrators jointly and sev-
erally firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited has begun in
the Circuit Court of the Third Circuit of the Territory of Hawaii,

a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or
1017 his deputies and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

Now Therefore if the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In Witness Whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

CLINTON J. HUTCHINS, *Trustee*.
HENRY WATERHOUSE, *Surety*.
ARTHUR B. WOOD, *Surety*.

The foregoing Bond is approved as to its sufficiency of sureties.
Dated July 21, 1903.

A. M. BROWN,
High Sheriff.

(Endorsed:) Filed August 1st, 1903, 7 o'clock A. M. J. P. Curtis, Clerk.

1018 Defendants objected to the admission in evidence of the said return bond upon the ground that there had been introduced in evidence the amended complaint in said action without the introduction of the original complaint in said action, such original complaint being in existence at the time the return bond was given and the amended complaint not being in existence at that time; further that said return bond was given and delivered by the sureties at the time that the original complaint was given, together with the affidavit of E. B. McClanahan; the original complaint and the affidavit only being in existence at the time such return bond was given.

Whereupon the court overruled said objections of defendants and received said return bond in evidence to which ruling of the Court the defendants then and there duly excepted and said ruling is here and now assigned as error by said defendants.

Exception No. III.

Transcript of Ev., pp. 8, 9, 10, 11, 12.

At the time of the offer in evidence of the return bond as set out in Exception No. II, plaintiff offered in evidence a certain replevin bond filed in an action theretofore pending in the Circuit Court of the

First Judicial Circuit, Territory of Hawaii, wherein William W. Bierce, Limited, was plaintiff and Clinton J. Hutchins, Trustee, was defendant, said replevin bond being in words and figures, as follows, to wit: Denominated Exhibit "B."

1019 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

(Stamped \$1.00.)

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Bond.

Know all men by these presents: That we, William W. Bierce, Limited, a Louisiana corporation having its principal place of business in Chicago, State of Illinois, acting herein by its duly authorized and appointed attorney-in-fact, H. A. Bigelow as Principal and John A. McCandless and William R. Castle as Sureties, both of Honolulu, Territory of Hawaii, and residing in said Honolulu, are held and firmly bound unto Clinton J. Hutchins, Trustee, his successor or successors in trust, heirs and assigns by these presents in the sum of thirty thousand (30,000) dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our successors, executors and administrators, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce Ltd. has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a Replevin suit against the above-mentioned defendant to recover from him certain property more specifically set forth in the Bill of Complaint filed in said suit, which is hereby referred to, and has in writing requested the High Sheriff of the Territory of Hawaii, or
1020 his Deputy, or the Sheriff of the Territory of Hawaii, or his Deputy to take the aforementioned property from the said defendant.

Now therefore if the said plaintiff shall well and truly prosecute the said action of Replevin to a successful and final termination, or in case the return of said personal property to the defendant be adjudged and said plaintiff, Principal herein, shall return the same to the said defendant and shall pay to him the said defendant such sum as may from any cause be recovered against the said plaintiff, then this obligation is to be null and void, otherwise to remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 20th day of July, A. D. 1903.

(Sig.) WILLIAM W. BIERCE, LIMITED,
By H. A. BIGELOW,
Its Attorney-in-Fact.
(Sig.) J. A. McCANDLESS.
(Sig.) WILLIAM R. CASTLE.

The foregoing bond is hereby approved as to its sufficiency of sureties.

Honolulu, July 20th, 1903.

(Sig.) A. M. BROWN,
High Sheriff.

Endorsed: 1370. Law No. 5782. Circuit Court, 3rd Circuit, Territory of Hawaii. William W. Bierce, Limited, a corporation, plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Bond. De Bolt, Judge. Kinney & McClanahan, Honolulu, Attorneys for W. W. Bierce, Ltd., Office No. —. Filed Aug. 1st, 1903, 7 o'clock A. M. J. P. Curts, Clerk. Law 6023. Exhibit B, plaintiff May 7/06. 3 documents. Stipulation. Return Bond. Replevin do. Law No. 6023. Plaintiff's Exhibit B. Filed May 7th, 1908. Job Batchelor, Clerk.

1021 Defendants thereupon objected to the introduction in evidence of said replevin bond for the reason that the same was incompetent, irrelevant and immaterial; that no proper foundation had been laid for the introduction of the same, and that during the progress of the argument counsel for the plaintiff called the court's attention to a stipulation which he claimed that the said redelivery bond, and not the replevin bond, could be received in evidence.

The court thereupon overruled the objections of defendants to the introduction in evidence of said replevin bond and admitted the same in evidence, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. IV.

Transcript of Ev., pp. 8, 9, 10, 11, 12.

Thereupon the following proceedings were had.

"The COURT: Let's see; the stipulation is offered as well?

"Mr. CATHCART: The court's ruling admits all; they were admitted all together.

"Mr. PROUTY: In order to preserve the proper order, then I would like to read the replevin bond first, that is the plaintiff's bond, and they were all offered together, the replevin bond and the stipulation and the——

"The COURT: I only understood that you offered the stipulation and the redelivery bond.

"Mr. CATHCART: No, the offer to read was the replevin bond, the return bond and the stipulation, and that was the order in which he made the statement.

"The COURT: You have no objection to that?

"Mr. CATHCART: Well, under the court's ruling our objection is made as to that and the court's ruling admits them all in that form; we take an exception to that.

"Mr. LEWIS: May we have an exception of record?

"The COURT: The exception will be allowed and the record will show it."

The stipulation referred to herein in this exception is in words and figures as follows, to wit:

1022 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse —, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Stipulation.

It is hereby stipulated by and between the parties in the above entitled cause that the redelivery bond filed in the action of replevin entitled William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee, and dated July 21, 1903,

Amended May 1st, 1907.— [a copy whereof is attached to the S. & L. Out. S. & L. plaintiff's amended complaint in the above entitled cause, and]* the original whereof now remains in the files of said Circuit Court of the First Circuit, was duly executed by the said Clinton J. Hutchins, Trustee, as principal, and the said Henry Waterhouse and Arthur B. Wood, as sureties and delivered to the high sheriff and filed in said action; and that the signatures to said bond are the genuine signatures of the said Clinton J. Hutchins, Trustee, Henry Waterhouse and Arthur B. Wood respectively.

It is also stipulated and agreed that this stipulation may be read on the trial of the above entitled cause as evidence of the facts
1023 hereinabove set forth, and that said bond may be so read in evidence without further proof of its execution.

Dated Honolulu, April 30, 1908.

(Sig.)

A. G. M. ROBERTSON,

Attorney for Plaintiff.

(Sig.)

CASTLE & WITHINGTON,

Attorneys for Clinton J. Hutchins, Trustee.

(Sig.)

SMITH & LEWIS,

Attorneys for the Executors under the Will of

Henry Waterhouse, Deceased, and Arthur B. Wood.

[* Words enclosed in brackets erased in copy.]

Endorsed: L. 6023. Circuit Court, First Circuit. Assumpsit. William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee, et al. Stipulation. Filed May 2d, 1908, at 10:30 o'clock A. M. J. A. Thompson, Clerk. Law 6023. Plaintiff's Exhibit B 1 Stipulation and 2 Return bond 3 Replevin do. May 7 '08 3 documents Law No. 6023 Plaintiff's Exhibit B. Filed May 7th, 1908. Job Batchelor, Clerk.

1024 Said ruling of the court admitting in evidence said replevin bond, stipulation and return bond is here and now assigned as error by said defendants.

Exception No. V.

Transcript of Ev., pp. 24, 25, 26.

Thereafter plaintiff offered in evidence a certain judgment rendered on the 19th day of March, 1904, in a certain action theretofore pending in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, wherein William W. Bierce, Limited, was plaintiff and Clinton J. Hutchins, Trustee, was defendant, said judgment being in words and figures as follows, to wit: "Denominated Exhibit J."

1025 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Judgment.

This cause by stipulation of parties and consent of the above entitled Court coming on regularly to be heard at the January 1904 Term of the Circuit Court of the First Judicial Circuit, before the Honorable John T. De Bolt, on the 7th day of March, A. D. 1904, and by stipulation of parties and consent of Court a jury having been waived and the above named plaintiff being present represented by its attorneys Messrs. Kinney, McClanahan & Cooper, and the above named defendant being present represented by his attorneys John W. Cathcart, Esq., and Messrs. Castle & Withington, and said cause proceeding to trial on said last named day and continuing until Saturday the 12th day of March, 1904, and the Court having heard the evidence adduced by the respective parties and being fully advised in that respect and argument having been made by the respective counsel, and the Court being advised in all ways in the premises and having at the close of said argument rendered a
1026 decision in favor of the plaintiff and against the defendant for the return of the property sued for in said action together

with the damages for its detention from the 1st day of June, 1903, to the date hereof, or in default to make return of said property that said plaintiff recover the value thereof shown to be the sum of \$22,000 together with damages as aforesaid for its detention;

Now, Therefore, it is ordered and adjudged that the above named defendant Clinton J. Hutchins, Trustee, forthwith return into the possession of William W. Bierce, Limited, or its authorized agents or attorneys the following described personal property now in the possession of said defendant:

362 tons of steel T rails weighing 35 pounds to the yard
Joints for laying 550 tons of steel T rails
Railroad track spikes to lay 550 tons of said rails
10 set- of 35 pound split switch material, complete
16 railway cars 25 feet long, 7 feet wide for 3 ft. gauge track
One 9 x 14 Class "A" saddle tank locomotive
One 10 x 16 back saddle tank locomotive
One Howe narrow gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers, 3 feet
One rail bender
One track drill
One section car with seats
Two Jacks

and that said William W. Bierce, Limited, do have and recover from said Clinton J. Hutchins, Trustee, the sum of \$1045.00 as damages for the detention of said property from the 1st day of June 1903, to the date hereof, together with the costs of this action taxed at the sum of \$50.50.

And it is further ordered and adjudged that on failure of the said defendant Clinton J. Hutchins, Trustee, to forthwith make such return of said property to the possession of said plaintiff; that said plaintiff William W. Bierce, Limited, have and recover from the said defendant Clinton J. Hutchins Trustee the value of said property found and adjudged herewith to be the sum of \$22,000 together with damages for its detention from the 1st day of June 1903 to the date hereof found and adjudged to be the sum of \$1,045.00 together with the costs of this action taxed at the sum of \$50.50.

Witness the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit.

Dated March 19th, 1904.

(Signed)

J. T. DE BOLT,
First Judge.

(Endorsed:) Filed March 19, 1904. P. D. Kellett, Jr., Clerk.

(Written on the back of page 428 is the following:) Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Defendant. Judgment. Filed Mch. 19, 1904. P. D. Kellett, Jr., Clerk.

1028 Whereupon said defendants objected to the introduction of said judgment in evidence upon the grounds that it was a judgment obtained in said action upon a complaint which was amended after the execution and delivery of the return bond upon which the surety in this action, Henry Waterhouse, appeared, in this: First, that the value as stated in the original complaint and affidavit upon which the original bond given by the plaintiff was given, was \$15,000, that the value being alleged as the actual value in the complaint, and such value being also stated in said affidavit as the actual value of the property; second, that during the course of the trial the complaint was amended, to change the value of the property as formerly alleged in the complaint at the time the bond was given to a value different from that sum, to wit, a raise from \$15,000 to \$20,000, and also during the course of the trial of said action, said complaint was again amended and the value of the property raised from \$20,000 to \$22,000; third, that during the course of the trial of said action, the complaint as it originally appeared in said action at the time the redelivery bond was given was amended so as to change the cause of action from that in which it stood at the time that said bond was given, such change being in respect to the contract upon which the action was brought.

That said objections to said judgment being received in evidence were by the court overruled and said judgment was received in evidence by the court, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. VI.

Transcript of Ex., pp. 26, 27.

Thereafter plaintiff offered in evidence a notice and motion for an order filed on the 24th day of March, 1904, in an action
1029 theretofore pending in the Circuit Court of the First Judicial Circuit, wherein William W. Bierce, Limited, was plaintiff and Clinton J. Hutchins, Trustee, was defendant, said notice and motion being in words and figures, as follows, to wit: Denominated Exhibit "L."

1030 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion.

Now comes the above named plaintiff, by its attorneys, Kinney, McClanahan & Cooper, and moves this Honorable Court for an order

requiring defendant to forthwith file in this cause a new re-delivery bond; or failing in which,

That execution issue on the judgment herein, unless defendant file a bond in double the sum of the judgment herein as provided by Section- 17 and 19 of Act 32 of the Session Laws of 1903;

This motion is based on the record in this cause including defendant's re-delivery bond, and on the affidavits of E. B. McClanahan, John F. Colburn and Percy M. Pond, hereto annexed referred to and made a part hereof.

Dated March 22nd, 1904.

(Sgd.) WILLIAM W. BIERCE, LIMITED,

By KINNEY, McCLANAHAN & COOPER,

Its Attorneys.

1031 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Defendant.

Replevin.

Notice.

To Messrs. Cathcart & Milverton and Messrs. Castle & Withington, Attorneys for Defendant:

Please take notice that the attached motion will be presented to the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit, on Friday the 25th day of March, A. D. 1904, at 9 o'clock A. M. of said day or as soon thereafter as counsel can be heard.

Dated March 22nd, 1904.

(Sgd.) KINNEY, McCLANAHAN & COOPER,

E. B. M.,

Attorneys for William W. Bierce, Ltd.

1032 Defendants thereupon objected to the introduction in evidence of said notice and motion for an order upon the ground that the same were incompetent, irrelevant and immaterial, and not binding on the defendants in this action.

Whereupon the court overruled said objections and received said notice and motion for an order in evidence to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. VII.

Transcript of Ev., p- 28, 29.

Thereafter plaintiff offered in evidence an execution issued on the 15th day of April, A. D. 1904, in a certain action then pending in

the Circuit Court of the First Judicial Circuit, Territory of Hawaii, — William W. Bierce, Limited, was plaintiff and Clinton J. Hutchins, Trustee, was defendant, said execution being in words and figures as follows, to wit:

Denominated Exhibit Q.

1033 Received May 21, 1904 at 10 a. m. (Sig.) J. K. Nahale
Deputy Sheriff N. Kona H.

In the Circuit Court of the First Judicial Circuit, Territory of
Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Execution.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the Island of Hawaii, or his Deputy:

Whereas, William W. Bierce Limited, did, heretofore in the Circuit Court of the Third Judicial Circuit bring a certain action of replevin against Clinton J. Hutchins Trustee, to recover the possession of certain railroad material equipment and accessories, (hereafter more particularly described) and did in such action file a replevin bond in the sum of \$30,000; and,

Whereas, after the seizure of said property by virtue of said bond, the defendant Clinton J. Hutchins Trustee, did retake the possession thereof by reason of having given a redelivery bond as required by law; and,

Whereas, said action being at issue, was by agreement of parties and consent of Court transferred for trial to the Circuit Court of the First Judicial Circuit; and,

Whereas, by further agreement of respective counsel, said action came on for trial before the Honorable John J. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit, jury waived;
and

1034 Whereas, a trial having been had, and judgment in said action rendered on the 19th day of March 1904 in favor of plaintiff, William W. Bierce Limited and against the defendant, Clinton J. Hutchins, Trustee, for the return of said property to the possession of William W. Bierce, Limited, or its authorized agent or attorney, together with the sum of \$1,045 found as damages for the detention of said property together with the costs of this action taxed at the sum of \$50.50, and in default to make return of said property then and in that event said William W. Bierce Limited to have and recover from said defendant Clinton J. Hutchins, Trustee, the value of said property found and adjudged to be the sum of \$22,000 together with said damages and costs; and,

Whereas, subsequently on the 28th day of March said defendant

was ordered to file a new re-delivery bond on or before the 1st day of April A. D. 1904, which time was subsequently extended to the 6th day of April 1904; and,

Whereas, on the 8th day of April 1904, said defendant being in default, in compliance with said order of the 28th day of March, execution was ordered to issue on said judgment unless said defendant on or before the hour of 9 o'clock of Friday the 15th day of April 1904 deposit in Court a bond in not less than double the amount of said judgment with sureties to be approved by the Court conditioned for the prosecution of the executions had therein without delay and for the performance and payment of the judgment or part thereof which may be rendered on said exceptions by the Supreme Court; and,

Whereas, said time has elapsed and the defendant has failed to file such bond.

Now therefore, you are commanded to forthwith proceed to seize and take possession of the following described property being the property covered by said judgment and situate at Kailua on 1035 the Island of Hawaii, Territory of Hawaii.

362 tons of steel T rails weighing 35 pounds to the yard
Joints for laying 550 tons of steel T rails
Railroad track spikes to lay 550 tons of said rails
10 set- of 35 pound split switch material, complete
16 railway cars 25 feet long 7 feet wide for 3 ft. gauge track
One 9 x 14 Class "A" saddle tank locomotive
One 10 x 16 back saddle tank locomotive
One Howe Narrow gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers, 3 feet
One rail bender
One track drill
One section car with seats
Two Jacks

And having taken such possession to deliver the same to William W. Bierce Limited, or its authorized agent or attorney.

And you are further commanded that in the event you cannot secure possession of said property, you are to levy upon the personal property of Clinton J. Hutchins, Trustee, defendant, in the above entitled action, and if sufficient cannot be found, then upon his real property, and giving 30 days' previous notice as required by law to sell the same or as much thereof as may be found necessary at public sale to the highest bidder in order to satisfy the alternative judgment of \$22,000 had herein.

And you are further commanded in any case to levy upon the personal property of said Clinton J. Hutchins, Trustee, and if sufficient cannot be found, then upon his real property, and giving 30 days' previous notice as required by law to sell the same, or so much thereof as may be found necessary at public sale to the highest bidder in order to satisfy said judgment rendered against him in favor of said William W. Bierce, Limited on said 19th day of March A. D. 1904, for damages and costs as follows:

Damages	\$1,045.
Costs of Court	50.50
Judgment entered for	1,095.50
Interest on \$23,095.50 from entry of judgment to date.....	98.70
Costs of execution	4.00
Total	\$1198.20

1036 And collect also legal interest thereon from date hereof with your costs and expenses and make return of this writ within sixty days, with the proceeds by you collected.

Hereof fail not at your peril.

Witness the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit this 15th day of April, A. D. 1904.

[SEAL.]

(Sig.)

HENRY SMITH,
*Clerk of the Circuit Court of the First Circuit
and of the Judiciary Department of the Territory of Hawaii.*

Endorsed: Law No. — Circuit Court, First Circuit Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. L. 5782 21/300 Execution. — — — Judge. Returned to Office by H. E. Cooper, May 27, 1904 J. A. Thompson, Clerk. Filed — 19— — — Clerk. Kinney McClanahan & Cooper 302-305 Judd Bldg. Honolulu Attorneys for — — — (Office No. —) Law No. 6023 Plaintiff's Exhibit "Q." Filed May 8th, 1908 Job Batchelor, Clerk.

I hereby certify on this 23rd day of May, M. H. 1904 at North Kona Hawaii. I return this Writ of Execution unsatisfied being unable to levy upon the properties therein described.

(Sig.)

J. K. NAHALE,
Deputy Sheriff, N. Kona, H.

Dated Kailua, May 23rd, 1904.

1037 Said defendants objected to said execution being received in evidence upon the ground that the same was incompetent, irrelevant and immaterial, upon the further ground that it was incompetent to bind the defendants in any way, being rendered upon a judgment which, for the reasons set forth in defendants' objections to the judgment (as set out in Exception No. V.) is not binding upon the defendants in this action, the sureties on the bond sued on herein, said defendants further objected to said execution as immaterial, because a return of the property is in no way dependent upon the issuance of an execution, the condition of the bond being to return it to the plaintiff in the case. Defendants further objected to said execution upon the ground that it was immaterial and incompetent because the return thereon is ambiguous and indefinite

and nothing could be gathered therefrom, and on the further ground that the judgment on which said execution was issued was reversed by the Supreme Court of the Territory of Hawaii; all of which objections were by the court overruled, and said execution received in evidence by the court, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. VIII.

Transcript of Ev., pp. 32, 33, 35, 36.

Thereafter plaintiff offered in evidence an assignment of errors filed January 13, 1906, in the Supreme Court of the Territory of Hawaii, in that certain action wherein William W. Bierce, Limited, was appellant and Clinton J. Hutchins, Trustee, was appellee, said assignment of errors being in words and figures, as follows, to wit: Denominated Exhibit X.

1038

Assignment of Errors.

In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Appellant,

vs.

CLINTON J. HUTCHINS, Appellee.

And now comes the appellant, William W. Bierce, Limited, a corporation, by Charles H. Aldrich, Henry S. McAuley, Henry W. Prouty and A. G. M. Robertson, its attorneys, and upon the allowance of its appeal herein to the Supreme Court of the United States, presents and files herein its assignment of errors, as to which matters and things it says that in the record and proceedings aforesaid of said Supreme Court of the Territory of Hawaii in the above entitled cause, wherein William W. Bierce, Limited, was plaintiff and Clinton J. Hutchins, Trustee, was defendant, and in the rendition of the final judgment therein, manifest error has intervened to the great prejudice and injury of said William W. Bierce, Limited, in the following, among other things, to-wit:

First. Said Supreme Court of the Territory of Hawaii erred in entering judgment in said cause reversing the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of said appellant for the return of the property in controversy in said cause, or in case the same should not be returned, for the value thereof, found to be the sum of
1039 Twenty-two Thousand Dollars (\$22,000.00) and interest thereon, and sustaining the exceptions of said appellee in so far as they raised the question of election.

Second. Said Supreme Court of the Territory of Hawaii erred in not affirming in all things the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of

Hawaii in favor of said appellant and against said appellee, for the return of the property in controversy in said cause into the possession of said appellant, and for the sum of One Thousand and Forty-five Dollars (\$1,045.00) damages for the detention of said property, together with costs of suit taxed at the sum of Fifty Dollars and Fifty Cents (\$50.50), or in the alternative, in case said property should not be so returned, for the value thereof found and adjudged to be the sum of Twenty-two Thousand Dollars (\$22,000.00) and for the sum of One Thousand and Forty-five Dollars (\$1,045.00) damages for the detention thereof, together with the costs of suit taxed at the sum of Fifty Dollars and Fifty Cents (\$50.50).

Third. Said Supreme Court of the Territory of Hawaii erred in sustaining the exceptions of said appellee, and each of them in said cause, in so far as such exceptions raised the question of an election by said appellant between inconsistent remedies, or between inconsistent remedial rights.

Fourth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-second exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-second exception is in the words and figures as follows, to-wit: "Immediately thereafter plaintiff proposed the following finding:

"That the contract of March 13th, 1901, was an entire 1040 contract and intended so to be, for a lump sum consideration which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and nonlienable items thereof; to which finding the defendant objected as follows:

"Defendant objects to the 6th proposed finding of fact upon the ground that said so-called finding contains mixed questions of law and fact, and upon the further ground that the evidence in said cause shows that the said contract of March 13th, 1901, was not an entire contract nor intended so to be, but was a contract supplementary to the contract of February 21st, 1900.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted and said ruling is here and now assigned as error by said defendant."

Fifth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-seventh exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-seventh exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action; to which findings the defendant objected as follows:

"Defendant objects to the 11th proposed finding of fact upon the ground that the same contains mixed questions of law and fact, and upon the further ground that the same is not supported by the evidence in said action.

1041 "The court then and there overruled said objection to which ruling of the court said defendant then and there duly

excepted, and said ruling is here and now assigned as error by said defendant."

Sixth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-eighth exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-eighth exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not intend to and did not in fact waive its title by bringing the action to enforce a materialman's lien against the Kona Sugar Company, Limited, and its Receiver; to which finding the defendant objected as follows:

"Defendant objects to the 12th proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Seventh. Said Supreme Court of the Territory of Hawaii erred in sustaining the fortieth exception of said appellee to the conclusion of law of said Circuit Court in said cause, which said fortieth exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following conclusion of law:

"That the contract of March 13th, 1901 was an entire contract for a lump sum consideration and contained lienable and 1042 non-lienable items; to which conclusion the defendant objected as follows:

"Defendant objects to the 6th proposed conclusion of law upon the ground that the same is not supported by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling of the court is here and now assigned as error by said defendant."

Eighth. Said Supreme Court of the Territory of Hawaii erred in sustaining the forty-first exception of said appellee to the conclusion of law of said Circuit Court in said cause, which said forty-first exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following conclusion of law:

"That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action; to which conclusion the defendant objected as follows:

"Defendant objects to the 7th proposed conclusion of law upon the ground that the same is not supported by any finding of fact herein, nor by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Ninth. Said Supreme Court of the Territory of Hawaii erred in ruling that said appellant was estopped from maintaining said action

of replevin for the property in controversy in said cause, for the reason that said appellant had previously elected to pursue a remedy inconsistent therewith, namely, by bringing the action for the price of said property and to enforce a materialman's lien for the same.

Tenth. Said Supreme Court of the Territory of Hawaii erred in ruling that by bringing the action to enforce a materialman's lien for the price of the property in controversy in said cause, said appellant made a binding election to waive performance of the condition precedent reserved to it in the contract of March 13th, 1901, between said appellant and the Kona Sugar Company, Limited, in pursuance of which said property was delivered to said sugar company, namely, payment in full of the promissory note in controversy in said cause, and to treat the title to said property as in said The Kona Sugar Company, Limited, or the receiver thereof, such as to preclude said appellant from maintaining said action of replevin for the possession of said property.

Eleventh. Said Supreme Court of the Territory of Hawaii erred in holding and construing said conditional sale contract of March 13th, 1901, in controversy in said cause, to be a severable contract and not an entire contract such as to prevent a severance of the price of the lienable items from the price of the nonlienable items of the property or materials in controversy in said cause.

Twelfth. Said Supreme Court of the Territory of Hawaii erred in not holding that said appellant had no right to maintain the materialman's lien proceedings, and that its attempt to exercise such nonexistent right was a mistake of remedy made in ignorance of its legal rights, and as such did not amount to an election between inconsistent remedies or remedial rights, such as to preclude said appellant from maintaining said action of replevin for the property in controversy in said cause.

1044 Thirteenth. Said Supreme Court of the Territory of Hawaii erred in not holding that the special findings of fact by said Circuit Court were sufficient to sustain the said judgment of said Circuit Court.

Fourteenth. Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said appellee to the entering of said judgment by said Circuit Court in said cause which were sustained by the said Supreme Court.

Fifteenth. Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said appellee to the rulings of said Circuit Court in said cause which were sustained by said Supreme Court.

Sixteenth. Said Supreme Court of the Territory of Hawaii erred in denying the petition of said appellant for a rehearing in said cause.

Wherefore, the said William W. Bierce, Limited, appellant, prays that for the errors aforesaid and other errors appearing in the record of said Supreme Court of the Territory of Hawaii in the above entitled cause to the prejudice of said appellant, the said judgment of the said Supreme Court of the Territory of Hawaii be reversed, an-

nulled, and for naught esteemed, and that the said judgment of the said Circuit Court of the First Judicial Circuit of the Territory of Hawaii be in all things affirmed, etc., to the end that justice may be done in the premises.

CHARLES H. ALDRICH,
HENRY S. McAULEY,
HENRY W. PROUTY,
A. G. M. ROBERTSON,
Attorneys for Appellant.

(Endorsed:) Filed January 13, 1906. George Lucas, Clerk.

1045 Said defendants objected to the introduction in evidence of said assignment of errors on the ground that the same were incompetent, irrelevant and immaterial, and absolutely valueless to prove anything in this action, whereupon the court overruled said objections and received said assignment of errors in evidence, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. IX.

Transcript of Ev., pp. 37, 38.

Thereafter plaintiff offered in evidence a petition for probate of Will filed February 24, 1904, in the matter of the Estate of Henry Waterhouse, deceased, a proceeding then pending in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers, and further offered in evidence the order for notice of hearing on said petition filed February 24, 1908, and the affidavit of publication of said notice filed April 4th, 1904, said petition, order for notice of hearing and affidavit of publication being in words and figures, as follows, to wit: Denominated Exhibit BB.

1046 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate.

At Chambers.

(Stamped \$2.00.)

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Petition for Probate of Will.

To the Honorable Presiding Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

The petition of Albert Waterhouse of Honolulu, Island of Oahu, Territory of Hawaii respectfully shows:

That the said Henry Waterhouse died at Honolulu Island of

Oahu Territory of Hawaii on or about the 20th day of February, 1904; that at the time of his death said Henry Waterhouse was a resident of said Honolulu, and left an estate and property in said Honolulu, Territory of Hawaii and elsewhere; that the character and value of said property situate in the said Territory of Hawaii are as follows, to wit:

Real property situate in Honolulu, Island of Oahu, Territory of Hawaii, and elsewhere, the probable value whereof is about Eighty Thousand Dollars (\$80,000).

Personal property, consisting of stocks, bonds, notes, livestock, life insurance, horses, carriages, furniture and situate in said Honolulu and elsewhere of the probable value of One Hundred and Sixty Thousand Dollars (\$160,000).

That in addition to the aforesaid property the said Henry Waterhouse, deceased, left certain real property in Cedar Rapids, State of Iowa, the value whereof is unknown to your petitioner.

That said Henry Waterhouse deceased, left a will bearing date the 24th day of March, 1903, which said will is herewith filed in
1047 said Court, and which said will your petitioner alleges to be the last will and testament of said deceased; that said will was duly executed by said deceased in his life-time, in said Honolulu, Territory of Hawaii, in the presence of Percy M. Pond and Antonio Q. Marcallino, the subscribing witnesses thereto, both of whom then resided and now reside in said Honolulu; that said deceased acknowledged the execution of the same in their presence and declared the same to be his last will and testament, and that said witnesses at the request of said testator and in his presence and in the presence of each other subscribed their names as witnesses thereto. That after the execution of said will, to wit, on the 13th day of April, 1903, the said Henry Waterhouse, deceased, duly executed a codicil to said last will and testament, which said codicil is herewith filed in said court, and which said codicil your petitioner alleges was duly executed by said deceased in his lifetime in said Honolulu in the presence of Edwin Benner and Antonio Q. Marcallino, the subscribing witnesses thereto, both of whom then resided and now reside in said Honolulu, Territory aforesaid; that said deceased acknowledged the execution of the same in their presence and declared the same to be a codicil to his last will and testament, and said witnesses at the request of said testator and in his presence and in the presence of each other subscribed their names as witnesses thereto. That your petitioner has made diligent search for any other wills or codicils of said deceased, but has been unable to find the same, and therefore alleges the foregoing last will and testament and the codicil thereto to be the last will and testament of the said Henry Waterhouse, deceased, and the said codicil to be the only codicil to said last will and testament.

That the said decedent at the time of the execution of said will and said codicil thereto as aforesaid was of the age of fifty-eight years and was of sound and disposing mind and in every other
1048 respect competent to devise and bequeath his said estate.

That William Waterhouse, brother of said deceased, and

your petitioner Albert Waterhouse, a son of the said deceased, are named in said will as the executors thereof.

That the said Albert Waterhouse consents to act as such executor.

That the names, ages and residences of the heirs, devisees and legatees of said deceased and in said last will and testament and codicil thereto named are as follows:

Ida Whan Waterhouse, widow of said deceased, aged about 42 years, and residing in said Honolulu, Territory aforesaid;

Eleanor Waterhouse Wood, a daughter of said deceased, aged about 34 years, and residing in said Honolulu, Territory aforesaid;

Mary Stangenwald Corbett, a daughter of said deceased, aged 32 years and residing at Middletown, New York;

And your petitioner Albert Waterhouse, a son of said deceased, aged 24 years, and residing at said Honolulu, Territory aforesaid.

That by said last will and testament it is provided that no bond shall be required of said executors.

Wherefore, your petitioner Albert Waterhouse prays that the said will and said codicil thereto may be admitted to probate and Letters Testamentary be issued to the said William Waterhouse and your petitioner Albert Waterhouse without their giving the bond required by law for the faithful performance of the duties of the trust as such executors; and for that purpose that this Honorable
1049 Court will appoint a day and time for the hearing of this petition and order due notice thereof to be given by publication to all persons interested herein according to law.

(Sig.)

ALBERT WATERHOUSE,

Petitioner.

(Sig.) SMITH & LEWIS,

Attorneys for Petitioner.

TERRITORY OF HAWAII,

Island of Oahu, ss:

Albert Waterhouse, being first duly sworn deposes and says: That he is the petitioner named in the foregoing petition, that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

(Sig.)

ALBERT WATERHOUSE.

Subscribed and sworn to before me this 23rd day of February, 1904.

[SEAL.]

(Sig.)

ROYAL D. MEAD,

Notary Public, First Judicial Circuit,

Territory of Hawaii.

Endorsed: P. 3669. 21/368. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Probate. In the Matter of the Estate of Henry Waterhouse, deceased. Petition for Probate of Will. [Recd. \$17.00.]* Filed February 24, 1904. J. A. Thompson, Clerk. Smith & Lewis, Attorneys at Law, Judd Building, Honolulu, T. H.

1050 In the Circuit Court of the First Circuit, Territory of Hawaii,
In Probate.

At Chambers.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Order for Notice of Hearing Petition for Probate of Will.

A Document purporting to be the last Will and Testament of Henry Waterhouse, deceased, and also a document purporting to be a codicil to said last Will and Testament having on the 24th day of February, A. D. 1904, been filed in the Circuit Court of the First Judicial Circuit Territory of Hawaii in Probate, and a petition for the Probate thereof and for the issuance of Letters Testamentary to William Waterhouse and Albert Waterhouse having been filed by the said Albert Waterhouse of Honolulu, Territory of Hawaii:

It is hereby ordered, that Monday, the 4th day of April, A. D. 1904, at ten o'clock A. M., of said day at the Court Room of said Court, in the Judiciary Building in said Honolulu be and the same hereby is appointed the time and place for proving said Will and Codicil and hearing said petition.

It is further ordered, that notice thereof be given, by publication, once a week for three successive weeks, in the Pacific Commercial Advertiser a newspaper published in the English language in said Honolulu, the last publication to be not less than ten days previous to the time therein appointed for hearing.

Dated at Honolulu, Oahu, T. H. February 24, A. D. 1904.

(Sig.)

GEO. D. GEAR,

Second Judge of said Circuit Court.

Attest:

(Sig.) WM. R. SIMS, *Clerk.*

Endorsed: Circuit Court, First Circuit. In Probate. At Chambers. In the Matter of the Estate of Henry Waterhouse, deceased. Order for Notice of Hearing Petition for Probate of Will. Filed February 24, 1904. J. A. Thompson, Clerk.

1051

Affidavit of Publication.

In the Circuit Court of the First
Circuit, Territory of Hawaii—
At Chambers—In Probate.

In the Matter of the Estate of
Henry Waterhouse, Deceased—
Order for Notice of Hearing
Petition for Probate of Will.

Edwarde Dekum of The Hawaiian Gazette Co. Ltd., Honolulu, H. I., being sworn says that he has examined a file of the Pacific Commercial Advertiser a Daily Newspaper published in the English language at Honolulu and that the notice of which the annexed is a printed copy,

A Document purporting to be the Last Will and Testament of Henry Waterhouse, deceased, and also a document purporting to be a Codicil to said Last Will and Testament having on the 24th day of February A. D. 1904, been filed in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in Probate, and a Petition for the Probate thereof and for the issuance of Letters Testamentary to William Waterhouse and Albert Waterhouse having been filed by the said Albert Waterhouse of Honolulu Territory of Hawaii:

It is hereby ordered, that Monday the 4th day of April, A. D. 1904, at ten o'clock a. m., of said day, at the court room of said Court in the Judiciary Building, in said Honolulu, be and the same hereby is appointed the time and place for proving said Will and Codicil and hearing said petition.

It is further ordered, that notice thereof be given, by publication, once a week for three successive weeks, in the Pacific Commercial Advertiser, a newspaper published in the English language in said Honolulu, the last publication to be not less than ten days previous to the time therein appointed for hearing.

Dated at Honolulu, Oahu, T. H. February 24, A. D. 1904.

GEO. D. GEAR,
*Second Judge of said
Circuit Court.*

Attest:

WM. R. SIMS, *Clerk.*

SMITH & LEWIS,

Attorneys for Petitioner.

6724—Feb. 25, Mar. 3, 10, 17.

was published in said newspaper four times [consecutively from]* Feb. 25, March 3d, 10th and 17th 1904 — to — 190— and that the last publication was not less than ten days previous to the time therein appointed for the hearing.

(Sig.) EDWARD DEKUM.

Subscribed and sworn to before me this 4th day of April, 1904.

(Sig.) WM. J. FORBES,
[SEAL.] *Notary Public,
First Judicial Circuit.*

[* Words enclosed in brackets erased in copy.]

Endorsed: Circuit Court, First Circuit, Territory of Hawaii. In the Matter of the Estate of Henry Waterhouse, deceased. Affidavit of Publication of Time and Place of Proving Will and Codicil Filed April 4th, 1904. Wm. R. Sims, Clerk.

1052 Said defendant objected to the introduction in evidence of said petition for probate of Will, Order for Notice of hearing and affidavit of publication upon the ground that the same were incompetent, irrelevant and immaterial; said objection was thereupon overruled by the court, and said documents received in evidence, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. X.

Transcript of Ev., p. 42.

Thereafter one Henry Smith having been called as a witness on behalf of the plaintiff identified on direct examination the execution, being Exhibit "Q" in this case, issued on the 15th day of April, 1904, out of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, and on redirect examination of said witness the following proceedings were had:

"MR. PROUTY:

Q. This execution was issued out of your office and brought back and filed in your office in the usual and regular course of business of your office as Clerk of the Judiciary Department, is that the fact."

To which question defendants objected upon the ground that the same was incompetent, irrelevant and immaterial, not proper re-direct examination, and that the execution and the law spoke for themselves, which objection of defendants was by the court overruled, to which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. XI.

Transcript of Ev., pp. 44-45.

Thereafter plaintiff offered in evidence a claim filed by William W. Bierce, Limited, with the executors under the Will of Henry Waterhouse, deceased, dated September 6th, 1904, said claims being in words and figures as follows to wit: Denominated Exhibit CC.

1053 In the Circuit Court of the First Judicial Circuit. In Probate.

At Chambers.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Creditors' Claim.

William W. Bierce Limited, a corporation duly organized and existing under the laws of the State of Louisiana hereby presents its claim as hereinafter specified against the estate of the above named decedent Henry Waterhouse as follows:

The Estate of Henry Waterhouse, Deceased, to Wm. W. Bierce, Ltd.,
Dr.

To amount due as surety on redelivery bond in the case
of Wm. W. Bierce Ltd. vs. C. J. Hutchins, Trustee... \$22,000.
Interest on said sum from date of judgment..... 578.

\$22,578.00

The particulars of this claim are briefly as follows:

On July 20th A. D. 1903 William W. Bierce Ltd. filed in the Circuit Court of the Third Judicial Circuit an action in replevin against one Clinton J. Hutchins Trustee for the recovery of certain property consisting of rails, engines, cars, railroad equipment etc. and upon filing an approved bond were given possession of the property. Said Hutchins then filed a redelivery bond in said court with the decedent Henry Waterhouse and one A. B. Wood as sureties in the words and figures following:

1054 Circuit Court, Third Circuit, Territory of Hawaii.

Stamps.

WILLIAM W. BIERCE, LTD., a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee.

Replevin.

Return Bond.

Know all men by these presents:

That we Clinton J. Hutchins, Trustee as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns in the sum of Thirty Thousand (30,000) Dollars, for the payment of which well and truly to be made, we bind our-

selves, our successors, herein and administrators jointly and severally by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his Deputies and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and deputies;

Now therefore if the said property and all thereof shall be well and truly delivered the said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Sg.)

CLINTON J. HUTCHINS, *Trustee*.

(Sg.)

HENRY WATERHOUSE, *Surety*.

(Sg.)

ARTHUR B. WOOD, *Surety*.

The foregoing Bond is approved as to its sufficiency of sureties.

(Sg.)

A. M. BROWN,

High Sheriff.

Dated July 21, 1903.

and thereupon said Hutchins resumed possession of said property. The cause was on December 17th 1903 transferred to the First Circuit and on March 19th 1904 judgment was duly rendered in plaintiff's favor for a return of the property in question or, in case said property was not returned, for the sum of \$22,000 such being the value placed by the court upon the property. An appeal was 1055 taken from said judgment, but pending appeal, execution was ordered to issue upon good cause shown and did so issue, but was returned wholly unsatisfied. No delivery of the property in question has ever been made although duly demanded nor has any payment of the said sum of \$22,000 been made, although duly demanded, and William W. Bierce Ltd. claims that it has a just and good claim in the above mentioned sum against the estate of Henry Waterhouse, who was one of the sureties on said bond.

WILLIAM W. BIERCE, LIMITED, *Creditor*.

By Its Attorney in Fact,

(Sig.)

S. H. DERBY.

HONOLULU, OAHU,

Territory of Hawaii, ss:

S. H. Derby being first duly sworn on oath deposes and says:

That he is the duly authorized and acting attorney in fact for

William W. Bierce Limited the above named claimant in this jurisdiction; that said William W. Bierce Limited is a corporation duly organized and existing under the laws of the State of Louisiana, and has no other representative in this jurisdiction except affiant, and the firm of Kinney, McClanahan & Cooper, which is its legal representative; that he knows the contents of the above claim and that the same is true of his own knowledge that no payments have been made thereon; that there are no off sets or counter claims in regard to the same, and that the same is now due and payable.

(Sig.)

S. H. DERBY.

Subscribed and sworn to before me this 6th day of September, A. D. 1904.

[SEAL.]

(Sig.)

GUSSIE H. CLARK,

Notary Public, First Judicial Circuit.

Endorsed: Probate No. —. At Chambers. In Probate. First Judicial Circuit Territory of Hawaii. In the Matter of the Estate of Henry Waterhouse, deceased. Creditor's Claim. — — —, Judge. Filed — — —, 19—, — — —, Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for — — —. (Office No. —.) No. 1 Claim. Law No. 6023. Plaintiff's Exhibit C. C. Filed May 11/08. Job Batchelor, Clerk.

1056 Defendants objected to the admission in evidence of said claim upon the grounds: First, that the same was incompetent, irrelevant and immaterial, because this is not the claim upon which plaintiff lays his foundation for his cause of action in this case, and second, because said claim was incompetent, irrelevant and immaterial, and more particularly incompetent upon the ground that it does not comply with the statute, in that the statute requires that the claim when presented, if it shows any statement of claim or voucher, shall be duly authenticated, and that there was nothing to show the authenticity of the bond attached to the claim.

Whereupon the following proceedings were had:

"Mr. PROUTY: We have a letter rejecting this first claim, your Honor, and I think it should be offered.

"The COURT: Have you any letter or have you any rejection of the second one.

"Mr. ROBERTSON: They took no action on the second claim; that is the reason we claim we are entitled to put in two, to show the whole transaction. The first one was rejected in writing, and the second one, no attention paid to it.

"The COURT: With that understanding then I will admit this in evidence; otherwise it would be immaterial."

To which ruling of the court, receiving said claim in evidence, defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. XII.

Transcript of Ev., p. 45.

Immediately thereafter the following proceedings were had:

"The COURT: This is with the understanding that you will offer the letter in evidence.

"Mr. ROBERTSON: Yes your Honor. This will be Exhibit 'CC.'

"Q. (On direct examination of one Albert Waterhouse called as a witness for plaintiff:) What if any action did the executors take with reference to this claim?

"A. They rejected it. It was rejected.

"Q. In writing?

"A. In writing.

"Q. I will ask whether or not this paper that you are now handing me was the letter rejecting that claim?

"A. It is.

"Mr. ROBERTSON: We offer this in evidence."

Whereupon defendants objected to said letter upon the same grounds as were urged against the admission of the said claim of September 6th 1904, which objection was by the court overruled, and said defendants then and there duly excepted to said ruling of the court, and said ruling is here and now assigned as error by said defendants.

Exception No. XIII.

Transcript of Ev., pp. 45-46.

Immediately thereafter and upon the direct examination of the said witness, Albert Waterhouse, the following proceedings were had:

"Mr. ROBERTSON:

"Q. This is your signature to this letter, is it not?

"A. Yes.

"Q. What did you do with this letter and the rejected claim?

"Mr. CATHCART: We still have the same objection to this.

"The COURT: Same ruling."

To which ruling of the Court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. XIV.

Transcript of Ev., pp. 46-47.

Immediately thereafter and upon the direct examination of the said witness, Albert Waterhouse, plaintiff offered in evidence a claim of William W. Bierce, Limited, filed with the executors under the

Will of Henry Waterhouse, deceased, dated September 30th 1904, and being Exhibit ("DD") in this case, said claim being in words and figures, as follows, to wit:

"EE."

1058 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Probate.

At Chambers.

In the Matter of the Estate of HENRY WATERHOUSE, Deceased.

Creditor's Claim.

William W. Bierce Limited, a corporation duly organized and existing under the laws of the State of Louisiana hereby presents its claim as hereinafter specified against the estate of the above named decedent Henry Waterhouse as follows:

The Estate of Henry Waterhouse, Deceased, to Wm. W. Bierce, Ltd.,
Dr.

To amount due as surety on redelivery bond in the case

of Wm. W. Bierce Ltd. vs. C. J. Hutchins, Trustee... \$22,000.

Interest on said sum from date of judgment..... 578.

\$22,578.00

The particulars of this claim are briefly as follows:

On July 20th A. D. 1903 William W. Bierce Ltd. filed in the Circuit Court of the Third Judicial Circuit an action in replevin against one Clinton J. Hutchins Trustee for the recovery of certain property consisting of rails, engines, cars, railroad equipment etc. and upon filing an approved bond were given possession of the property. Said Hutchins then filed a redelivery bond in said court with the decedent Henry Waterhouse and one A. B. Wood as sureties, a certified copy of which is hereto attached, and thereupon said Hutchins resumed possession of said property. The cause was on December

1059 17th 1903 transferred to the First Circuit and on March 19th 1904 judgment was duly rendered in plaintiff's favor for a return of the property in question or, in case said property was not returned, for the sum of \$22,000 such being the value placed by the court upon the property. An appeal was taken from said judgment, but pending appeal, execution was ordered to issue upon good cause shown and did issue, but was returned wholly unsatisfied. No delivery of the property in question has ever been made although duly demanded nor has any payment of the said sum of \$22,000 been made, although duly demanded and William W. Bierce Ltd. claims that it has a just and good claim in the above mentioned sum

against the estate of Henry Waterhouse, who was one of the sureties on said bond.

WILLIAM W. BIERCE, LIMITED, *Creditor*,
By Its Attorney in Fact,
(Sig.) S. H. DERBY.

HONOLULU, OAHU,
Territory of Hawaii, ss:

S. H. Derby being first duly sworn on oath deposes and says:

That he is the duly authorized and acting attorney in fact for William W. Bierce Limited the above named claimant in this jurisdiction; that said William W. Bierce Limited is a corporation duly organized and existing under the laws of the State of Louisiana, and has no other representative in this jurisdiction except affiant, and the firm of Kinney, McClanahan & Cooper, which is its legal representative; that he knows the contents of the above claim and that the same is true of his own knowledge that no payments have been made thereon that there are no off sets or counter claims in regard to the same and that the same is now due and payable.

(Sig.)

S. H. DERBY.

Subscribed and sworn to before me this 30th day of September A. D. 1904.

(Sig.)

GUSSIE H. CLARK,
Notary Public, First Judicial Circuit.

1060 Circuit Court, Third Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
v.

CLINTON J. HUTCHINS, Trustee.

Replevin.

Return Bond.

\$1.00 Stamp.

Know all men by these presents:

That we Clinton J. Hutchins, Trustee as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns in the sum of Thirty Thousand (30,000) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, herein and administrators jointly and severally firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to

recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his Deputies and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

1061 Now Therefore if the said property and all thereof shall be well and truly delivered to the said plaintiff, if said delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July A. D. 1903.

(Sig.)

CLINTON J. HUTCHINS, *Trustee.*

(Sig.)

HENRY WATERHOUSE, *Surety.*

(")

ARTHUR B. WOOD, *Surety.*

The foregoing Bond is approved as to its sufficiency of sureties.
Dated July 21, 1903.

(Sig.)

A. M. BROWN,
High Sheriff.

TERRITORY OF HAWAII,
Island of Hawaii, ss:

I hereby certify that the foregoing is a full, true and correct copy of the Original Return Bond, filed in the Circuit Court Third Circuit, in the case of William W. Bierce, Limited, a corporation, v. Clinton J. Hutchins, Trustee.

Witness my hand and the Seal of the Circuit Court, Third Circuit, Territory of Hawaii, this 30th day of October, A. D. 1904.

[SEAL.]

(Sig.)

GEORGE LUCAS,
Clerk First Circuit Court.

Endorsed: Probate No. —. At Chambers. In probate. First Judicial Circuit, Territory of Hawaii. In the Matter of the Estate of Henry Waterhouse, deceased. Creditor's Claim. — — —, Judge. Filed — — —, 19—. — — —, Clerk. Kinney & McClanahan, 302-305 Judd Bldg., Honolulu, Attorneys for —. (Office No. —.) Claim No. 2. Law. No. 6023. Plaintiff's Exhibit E. E. Filed May 11, 1908. Job Batchelor, Clerk.

1062 Defendants thereupon objected to the introduction in evidence of said claim of September 30th 1904, on the ground that it was shown by the admissions of counsel for plaintiff, and the pleadings of their complaint that the suit was instituted on said claim prior to any rejection of the claim by the executors, which objection was by the court overruled, to which ruling of the court

defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. XV.

Transcript of Ev., pp. 52-53-54.

Thereafter, and on the redirect examination of the witness Albert Waterhouse, said witness was asked on direct examination the following question:

"Q. After you received the claim, what did you do with it." To which question defendants objected upon the ground that the same was incompetent, irrelevant and immaterial, and not proper redirect examination, and upon the further ground that the pleadings in this case had been settled on demurrer and complaint as they stand, and that it was not competent for the plaintiff, having proved his case as it stands in the complaint, to seek now on redirect examination to get information on which to amend his complaint.

Said objections of defendants were by the court overruled, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. XVI.

Transcript of Ev., pp. 54-55.

Immediately thereafter the following proceedings were had on redirect examination of the said witness, Albert Waterhouse:

1063 "A. My recollection is that I took it to my legal advisors; we talked it over; I then consulted with my uncle who was in Pasadena.

Mr. PROUTY:

"Q. Who was your uncle?

"A. Mr. William Waterhouse.

"Q. Mr. William Waterhouse?

"A. Yes.

"Q. Is he also one of the executors?

"A. Yes sir.

"Q. And was he in Pasadena at the time you received it?

"A. Yes sir.

"Q. And you waited until he came down here and then consulted with him about it?

"Mr. CATHCART: I object to it as leading and not redirect.

"Mr. LEWIS: Your Honor will give us an exception to this whole line of testimony.

"The COURT: Very well, so understood."

Thereafter the witness Albert Waterhouse testified that he had conversations with his counsel and his uncle William Waterhouse concerning said claim on September 30th, all of which testimony

was duly objected to by the defendants as incompetent, irrelevant and immaterial, and not proper redirect examination, which objections were by the court overruled, to which rulings of the court defendants then and there duly excepted, and said rulings are here and now assigned as errors by said defendants.

Exception No. XVII.

Transcript of Ev., pp. 59-60.

Thereafter one F. B. McStocker was called as a witness on behalf of the plaintiff, and on the direct examination of said witness the following proceedings were had:

1064 "Direct examination of F. B. McStocker, called and sworn.

Mr. ROBERTSON:

Q. Your name is Francis B. McStocker?

A. Francis Blakeley.

Q. You reside in Honolulu?

A. Yes sir.

Q. Are you the treasurer of the Kona Development Co. Ltd.?

A. I am.

Q. State whether or not you have brought with you, pursuant to the subpoena issued by you, a deed from Clinton J. Hutchins to yourself, dated November the 7th 1905, conveying certain property formerly belonging to the Kona Sugar Co.

A. It has been impossible for me to bring the deed cited in the subpoena; I have made a careful search for it. One of the deeds mentioned, from the Kailua Sugar Co. to myself, was sent back to San Francisco on account of some error in the execution and acknowledgment; it was sent back to be re-acknowledged to Chickerling & Gregory, and presumably it had been lost in the fire but we have not been able to find out yet exactly what has become of it; we are chasing it up to make a search for it.

Q. Do you remember if that deed was ever recorded?

A. No, it was not, because the acknowledgment was faulty, deficient, and would not be accepted here, so it was sent back for the purpose of having it re-acknowledged, properly acknowledged.

1065 Q. Well, how about this deed from Clinton J. Hutchins, dated November the 7th, 1905?

A. I have certified copies of two deeds. During some recent arbitration affairs the deeds were taken out of our vault and I have not been able to locate the originals yet. I have a copy of a deed, F. B. McStocker to the Kona Development Co., which you called for, and deed, C. J. Hutchins to F. B. McStocker, that is, a copy.

Mr. WITHINGTON: Wait a minute. Before they are called for I want to raise the question whether any of these is admissible. My point is, I don't think counsel on the other side can bring papers into court which are immaterial in the action, which are not part of

the public files, not papers which relate to matters now in issue in this action, and inspect them. I object to your examining that at all. (To Mr. Robertson:) I object to your examining that until the court rules.

(Seizes hold of paper in Mr. Robertson's hands.)

The Court: I ask you to desist (to Mr. Withington).

Mr. WITHINGTON: I submit, may it please your Honor, that is the point I am asking your Honor, whether he should at least make some proffer upon which it may be material to the case. So far nothing has been shown that it is in any way material to the case, and counsel proceeds to examine papers before—

The COURT: I think they have a perfect right to do that. I am somewhat surprised at your conduct, Mr. Withington.

Mr. WITHINGTON: I desire to except to your Honor's ruling, and also to your Honor's comment on my conduct."

1066 Which said actions of the court then and there duly excepted to by Mr. Withington as above set out are here and now assigned as error by said defendants.

1067

Exception No. XVIII.

Transcript of Ev., pp. 60-61-62.

Immediately thereafter the following proceedings were had:
1068 "The COURT: Exceptions may be noted. Let the record show that, so it will be complete, while Mr. Robertson was examining the paper, Mr. Withington advanced, grabbed the paper, and sought to take it from him in open court in the presence of the jury. That is the conduct to which the court alludes.

Mr. WITHINGTON: I would like to call the court's attention to the fact that I did not seek to take it from him; I merely put my hand over it. I submit in a court of justice we have a right to at least have stated to the court whether papers are material or not.

The COURT: Oh, I think not. You can examine it but one counsel might think it was material and opposing counsel might think not.

Mr. CATHCART: When papers are brought into court and when the witness is asked to produce them, and counsel goes up and takes them from him and then we come up and make a formal objection to their being introduced—or being handed to counsel, is it not—to their being brought into court and handed to counsel and state to the court that we don't think it is right, we want to make an objection to their examining them, isn't it only fair that counsel should wait until the court rules on our objection before he proceeds to examine the papers? We submit we are right here and that counsel has gone to work and examined papers while we have a motion pending before the court.

Mr. WITHINGTON: And your Honor stated you were powerless to enforce it. I simply put my hand over the face of the paper.

The COURT: I observed what took place. There is no occasion to

1069 discuss it further, Mr. Withington. Mr. McStocker is plaintiff's witness; I think so far Mr. Robertson has proceeded regularly.

Mr. LEWIS: When we object to certain documents being introduced in evidence——

The COURT: Wait until they are offered.

Mr. CATHCART: Being brought into court and handed to counsel, haven't we got a right to have the court rule on that before we proceed? We will note an exception to the ruling of the court. We would like to have your Honor's ruling on the last matter, that we haven't any right to make this objection, and would like to except to it.

The COURT: Exception may be noted."

1070 Which said actions of the court then and there duly excepted to by Mr. Cathcart as above set out are here and now assigned as error by said defendants.

1071 *Exception No. XIX.*

Transcript of Ev., pp. 62-63.

Thereupon counsel for plaintiff proceeded on direct examination to examine said witness, F. B. McStocker, relative to said deed dated November 7th, 1905, whereupon defendants objected to any examination of said witness upon said deed, unless some statement was first made by counsel for plaintiff to connect said document, whereupon the following proceedings were had:

"Mr. LEWIS: I would like to have the court rule on my motion that no further evidence be produced or any further questions asked relative to these questions until counsel comes forward with an offer to connect.

"The COURT: I think we will have to wait until this instrument is offered and then I will pass on the materiality of it."

To which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. XX.

Transcript of Ev., pp. 66-67.

Thereafter plaintiff offered in evidence the exemplification of the record of the articles of incorporation of William W. Bierce, Limited, dated December 2nd, 1905, said exemplification being in words and figures as follows, to wit:

Denominated "I. I."

1072 STATE OF LOUISIANA,

Parish of Orleans, City of New Orleans:

Be it known, that on this Second day of December in the year [nineteen hundred and]* One Thousand, eight hundred and ninety nine. Before me, Jefferson Charles Wenck, a Notary Public, in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned: Personally came and appeared, the persons whose names are hereunto subscribed, all above the full age of majority: who severally declared that availing themselves of the provisions of an act of the Legislature of this State, known as Act No. 36 of the session of 1888, as well as of those of the general laws of this State relative to the organization of corporations, they have formed and organized, and by these presents do form themselves into and constitute a quorum for the objects and purposes and under the stipulations and agreements hereinafter set forth and expressed, which they hereby adopt as their charter, to wit:

Article I.

The name and title of this corporation shall be William W. Bierce "Limited". Its domicile shall be in the City of New Orleans, State of Louisiana, and it shall have and enjoy succession under its corporate name for a period of Ninety-nine years from and after the date hereof.

Said corporation shall have power and authority to contract, sue and be sued in its corporate name; to make and use a corporate seal, and the same to break or alter at pleasure; to hold, receive, lease, hire, purchase sell and convey, as well as to mortgage and hypothecate under its corporate name, both real and personal property; to borrow and lend money, issue bonds and notes, give and receive securities therefor, with power to sell pledge or otherwise dispose of same; name and appoint such managers, directors, officers, overseers and agents as the interest and convenience of said corporation may require; to make and establish such by-laws, rules and regulations for said corporation as may be necessary and proper, and the same to alter, and amend at pleasure.

Article II.

The objects and purposes for which this corporation is organized, and the nature of the business to be carried on by it, are hereby declared to be—the acquisition of the business, property and good will of the Commercial firm of William W. Bierce, situated in the City of New Orleans and elsewhere, including all the patents now owned by them or in which they are interested, and to continue and conduct a similar business; and in connection therewith to conduct the business of general contractors and manufacturers and of furnishers of construction material; to act as Manufacturers' agents and

[* Words enclosed in brackets erased in copy.]

representatives, and generally in reference to the foregoing to do such things and engage in such pursuits as may pertain thereto, or enure to the benefit of this corporation.

All citations shall be made upon the President of this corporation, and in his absence, the Vice-President thereof.

Article III.

The capital stock of this corporation is hereby fixed at the sum of three hundred thousand (\$300,000) dollars, divided into and 1074 represented by three thousand (3000) shares of the par value of one hundred (\$100) dollars each, which capital stock may be increased or reduced at a meeting called for said purpose as the law provides. The payment of said stock shall be made in cash at such times, in such amounts and upon such notice as may be prescribed by the Board of Directors, who shall also have power to issue full paid stock in payment of property, either real or personal transferred to this corporation, or for labor done for it, at such times and in such manner as may be determined by the Board of Directors. This corporation shall become a going concern as soon as Five Thousand dollars of the capital stock shall have been subscribed for.

Article IV.

All the corporate powers of this corporation shall be vested in a Board of Directors, to be composed of Three persons, each of whom shall be a stockholder of record in his own right, to be elected hereafter on the day herein set forth, except the first, which is hereinafter provided for.

The election of the Board of Directors shall be held on the second Tuesday of January of each year, beginning in the year 1901; which Board shall have power to make all needful rules and by-laws for the government and regulation of the Company and of its officers, agents and employes, and to conduct the same, and to appoint subordinate officers and agents necessary to that end.

The elections shall be held at the office of the Company under the supervision of two Commissioners, to be appointed by the Board of Directors. Ten days' notice of such meeting shall be given by the Secretary in writing to each stockholder, at his last known residence; and the Directors then elected shall serve until their successors are elected and qualified. A majority of the votes cast 1075 shall elect, and one vote shall be allowed for each share of stock represented by the holder, in person or by proxy.

Any vacancy occurring in said Board from any cause whatsoever shall be filled by the remaining Directors, and a majority of the Directors shall constitute a quorum for the transaction of business. The Board of Directors shall, at their first meeting in each year, elect out of their number a President, and a Vice-President, and also elect a Secretary-Treasurer, who need not be a Director or stockholder, and from time to time — appoint such other officers, clerks, overseers and agents as may be deemed necessary for the purpose and business of said corporation, and dismiss the same at pleasure.

The following named persons, to wit: William W. Bierce, Columbus Bierce and Charles F. Pierce, shall be and are hereby constituted for the first Board of Directors, with the said William W. Bierce, as President, Columbus Bierce, as Vice-President and Charles F. Pierce, as Secretary-Treasurer, and who shall hold their offices until the second Tuesday of January, 1901, or until their successors are duly elected and shall have qualified and taken their seats.

Any Director may, in writing, appoint, and at his pleasure revoke, a proxy to act for and represent him in his absence at meetings of the Board.

Article V.

Whenever this corporation is dissolved, either by limitation or from any cause, its affairs shall be liquidated under the supervision of two Liquidating Commissioners to be appointed for that purpose [from]* among the stockholders at an election held for that purpose, after ten days' prior notice by the Secretary in writing to each stockholder, at his last known residence, and upon the assent of a majority of the capital stock of said corporation.

1076 Said Commissioners shall remain in office until after the affairs of said corporation shall have been duly liquidated, and in the event of the death of one of the liquidators, the survivor shall continue to act.

Article VI.

This act of incorporation may be changed, altered or amended, or this corporation may be dissolved with the assent of Three-fourths of the stock represented at a meeting for the purpose, after ten days' written notice to each stockholder directed to his last residence.

Article VII.

No stockholder of this corporation shall ever be held liable or responsible for the contracts or faults thereof, in any further sum than the unpaid balance due to the Company on the shares owned by him, nor shall any mere informality in organization have the effect of rendering this charter null, or of exposing a stockholder to any liability beyond the amount of his stock.

Thus done and passed in my Notarial Office at the City of New Orleans aforesaid, in the presence of Charles J. Herr and Sam Henderson, Jr., Competent witnesses of lawful age and residing in this City, who hereunto subscribe their names together with said appearers and me Notary on the day and date set forth in the caption hereof.

[* Word enclosed in brackets erased in copy.]

Original Signed.

Wm. W. Bierce, Twenty (20) shares.
 Columbus Bierce, Twenty (20) shares.
 Charles F. Pierce, Ten (10) shares.

CHAS. J. HERR.
 SAM HENDERSON, JR.

JEFF. C. WENCK,
Not. Pub.

1077 I, the undersigned Recorder of Mortgages in and for the Parish of Orleans, State of Louisiana, do hereby certify that the above and foregoing act of Incorporation of William W. Bierce "Limited" was this day duly recorded in this Office in Book 646 folio 700.

New Orleans, December 22nd, 1899.

[SEAL.] (Signed)

GEO. GUINAULT, *D'y R. M.*

I, the undersigned Notary do hereby certify that the above and foregoing is a true and correct copy of the original act of "William W. Bierce "Limited" together with the Certificate of the Recorder of Mortgages thereunto appended, on file and of record in my Office.

In faith whereof, I hereunto set my hand and seal this 22nd day of July A. D. 1903.

[SEAL.] (Sig.)

JEFF. C. WENCK, *Not. Pub.*

Endorsed: New Orleans, Dec. 2nd, 1899. Act of Incorporation of William W. Bierce "Limited." Recorded Mortgage Office Book 646 fo. 700 Jefferson C. Wenck, (Successor to John Bendernagel.) Notary Public, 301 & 302 Cora Building, 818 Common Street. New Orleans, La.

1078 UNITED STATES OF AMERICA,
State of Louisiana:

Civil District Court for the Parish of Orleans.

I, John St. Paul, Presiding Judge of the Civil District Court for the Parish of Orleans, a Court of Record, having jurisdiction, do hereby certify, that Jefferson C. Wenck is a duly commissioned and qualified Notary Public for the Parish of Orleans, State of Louisiana, resident in the City of New Orleans; that the attestation of said Notary Public to the document hereunto annexed is in due form and that the signature of said Notary Public appended to said attestation is true and genuine.

Given under my hand at the City of New Orleans, on the Twenty-seventh day of July in the year of our Lord, one thousand nine hundred and three (1903) and in the 128th year of the Independence of the United States of America.

(Sig.)

JOHN ST. PAUL, *Judge.*

I, Thomas Connell, Clerk of the Civil District Court for Parish of Orleans, do hereby certify that John St. Paul, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding judge of the Civil District Court for the Parish of Orleans, duly appointed and commissioned and qualified as such, and that said attestation is in due form of law.

Witness my hand and the seal of said Court, this Twenty-seventh (27) day of July 1903.

[SEAL.]

(Sig.)

T. CONNELL, Clerk.

Endorsed: L. 5782. Exhibit "AA" for Identification. Wm. W. Bierce Ltd. v. C. J. Hutchins Trustee. Filed March 8th, 1904 by Mr. McClanahan. P. D. Kellett, Jr. Clerk Law No. 6023 Plaintiff's Exhibit I. I. Filed May 12, 1908. Job Batchelor, Clerk.

1079 Defendants objected to said exemplification being received in evidence upon the ground that the same was incompetent, irrelevant and immaterial, that no proper foundation has been laid for its introduction, that it did not comply with the statutes of Louisiana, that it was hearsay only and that there was nothing to show that by any law of the State of Louisiana, the notary public signing the certificate was the keeper of the records of incorporation, and further that it appeared on the face of the certificate, that he is not the keeper of the records, because what he certifies to is that it was recorded in his office, which objections were by the court overruled, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. XXI.

Transcript of Ev., pp. 67-68.

Thereafter, one J. A. Thompson was recalled as a witness on behalf of plaintiff and testified on examination by counsel for plaintiff as follows, to wit:

"MR. PROUTY:

"Q. Mr. Thompson, have you computed the interest on the value of the property as assessed in the judgment of March 19th 1904, in the replevin suit of William W. Bierce, Limited against Clinton J. Hutchins, Trustee, at \$22,000, and also on the judgment for costs rendered in the same suit on September 27th 1907, by the Supreme Court of the Territory of Hawaii?

"A. I have.

"Q. If you have prepared such a computation will you be good enough to state what the items are, first stating the amount of the judgment and then the interest, and the judgment for costs and the interest on that?

Said last question was objected to by defendants on the ground that the same was incompetent, irrelevant and immaterial, and upon

the further ground that at the time the bond was entered into the allegation of value was \$15,000, and the affidavit accompanying the complaint at that time was \$15,000, and that subsequently thereto after the execution and delivery of the bond in question the complaint was amended to show, first \$20,000, and afterwards 1080 \$22,000, and further that the complaint made a separate and distinct cause of action at the time of the execution and delivery of said bond, and further objected to a computation of any kind upon the ground that the same is incompetent, irrelevant and immaterial.

Said objections of defendants were by the court overruled, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. XXII.

Transcript of Ev., pp. 68-70.

Thereupon the said witness J. A. Thompson produced a memorandum showing the computations referred to in Exception No. XXI herein, which memorandum was by plaintiff offered in evidence, whereupon defendants objected to the introduction in evidence of said memorandum upon the ground that the same was incompetent, irrelevant and immaterial, which objection was by the court overruled, and said memorandum received in evidence, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. XXIII.

Transcript of Ev., pp. 71-72.

Thereafter plaintiff offered in evidence a deed dated November 7th 1905, by Clinton J. Hutchins, Trustee, to Francis B. McStocker, said deed being in words and figures as follows, to wit:

1081 "Know all men by these presents that I, Clinton J.

Hutchins, acting both individually and as trustee, of Honolulu, Territory of Hawaii, in consideration of the sum of ten dollars, to me paid by Francis B. McStocker, of said Honolulu, the receipt whereof is hereby acknowledged, and in further consideration of the undertaking by said Francis B. McStocker to organize a corporation to take over certain lands, leases and property now owned by the Kailua Sugar Co., a California corporation, and by myself, said property being situate in the district of North Kona, Island of Hawaii, and being part of the property conveyed to me by F. L. Dortch, receiver of the Kona Sugar Co. Ltd., by deed dated June 13th 1903, I do hereby give, grant, bargain sell convey, assign, set over and deliver unto the said Francis B. McStocker all of the following lands, leases and leaseholds therein described, personal property roads and franchises, viz:

"One. Lease from Queen Kapiolani to A. Fernandez and Frank Gouveia, dated September 14th 1892, for fifteen years, of the lands of Waiaha I and Kahului II, situate at North Kona, Island of Hawaii, and being recorded in the Registry of Deeds at Honolulu in Book 144 on page 269.

"Two. That certain lease from said Kapiolani to J. Coerper of lands in the ahupuaas of Waiaha I and Kahului II, dated April 13th 1895, for thirteen years with the privilege of extension for seventeen years more, and recorded in said Registry of Deeds in Book 156 on pages 29 and 30.

"Three. That certain confirmation by the Kapiolani Estate, Ltd., of said last named lease, dated January 31st, 1901.

1082 "Four. All of that certain sugar mill, buildings, machinery, equipment, shops, tools, implements and appurtenances on, upon, about, or connected with or incidental to, the sugar manufacturing plant lately belonging to the Kona Sugar Co. Ltd., and sold to me as aforesaid by said F. L. Dortch, receiver as aforesaid.

"Five. All other lands, leases and leaseholds, personal property, rights, easements, privileges and appurtenances conveyed to me or intended so to be by the said F. L. Dortch, receiver as aforesaid, by the said deed aforesaid, and not heretofore assigned by me to C. J. Falk or heretofore sold or assigned by me to J. R. Sloan by deed dated February the first, 1904.

"To have and to hold the said described property, together with all the rights, easements, privileges and appurtenances thereunto or to any part thereof belonging, unto the said Francis B. McStocker, his heirs, executors, administrators and assigns, to their sole use and benefit and behoof forever.

"And I, the said Clinton J. Hutchins, both individually and as trustee, do hereby, for myself and my representatives and assigns, covenant with the said Francis B. McStocker, his heirs, executors, administrators and assigns, that I will forthwith cancel and cause to be cancelled by the Kailua Sugar Co. that certain agency agreement between the Kailua Sugar Co. and C. J. Hutchins and that certain planting and grinding agreement between the said Kailua Sugar Co. and Clinton J. Hutchins both of said agreements being dated February the 14th 1904: that I am lawfully seized in fee of said property, other than said leases and said leaseholds; that I have good
1083 right to sell, convey, assign and deliver all of said described property as aforesaid; that the same are free from all incumbrances and that I *am* and my heirs, executors, administrators and assigns, warrant and defend the said property and each and every part thereof unto the said Francis B. McStocker, his heirs, executors, administrators and assigns, against the claims and demands of all persons.

"In witness whereof I have hereunto set my hand and seal this 7th day of November, A. D. 1905.

"CLINTON J. HUTCHINS. *Trustee.*

"CLINTON J. HUTCHINS."

1084 Defendants objected to said deed being received in evidence upon the ground that the same was incompetent, irrelevant and immaterial, which objection was by the court overruled, to which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

1085

Exception No. XXIV.

Transcript of Ev., p. 78.

Thereafter plaintiff offered in evidence a deed from F. L. Dortch recorded in the office of the Registrar of Conveyances of the Territory of Hawaii, in liber 249, page 369, said deed being in words and figures as follows, to wit:

Denominated Exhibit JJ.

1086 "This Indenture made this 13th day of June, 1903, by and between F. L. Dortch, receiver of the Kona Sugar Co. Ltd., party of the one part, and Clinton J. Hutchins, Trustee of Honolulu, T. H., the party of the other part.

"Witnesseth, that whereas, by an order issued in the matter of "M. W. McChesney & Sons versus Kona Sugar Co. Ltd., et al.," pending in the Third Circuit Court of the Territory of Hawaii, by Honorable W. S. Edings, Judge of said Court, the said F. L. Dortch, receiver as aforesaid, was directed to sell at public auction and to the highest bidder, all and singular the property and effects of the said defendant corporation, the Kona Sugar Co. Ltd., and

"Whereas, in accordance with said order and direction the said receiver did offer the said property of the Kona Sugar Co. Ltd. at such public auction at 12 o'clock noon on the 9th day of May 1903, at the front door of the court-house at Kailua, Hawaii, such being the time and place named in said order for said sale, and

"Whereas the said Clinton J. Hutchins offered the highest and best bid for said property at said sale, to wit, the sum of \$12,250, and

"Whereas by an order and decree made and entered by the said Honorable W. S. Edings on the first day of June, 1903, the said sale and bid were confirmed and the said receiver ordered and directed to execute and deliver to said purchaser any and all instruments in writing necessary to effectually convey to said purchaser the said property and effects of said Kona Sugar Co. Ltd.,

"Now therefore, I, F. L. Dortch, receiver of the said Kona Sugar Co. Ltd., by virtue of the authority and direction in said order contained, and for and in consideration of the sum of \$12,250

1087 to me in hand paid, the receipt of which is hereby acknowledged, and as receiver of said company, do by these presents give, grant, bargain, sell, convey, assign and set over unto the said purchaser, the said Clinton J. Hutchins, Trustee, his successors and assigns, all the right, title and interest of the said Kona Sugar Co. Ltd. in and to all and singular the goods, chattels, effects and property, real, personal and mixed, of the said company; that is to say,

all of the lands, tenements and hereditaments, all interests in lands, leases and leaseholds, easements, railroad, railroad equipment, locomotives, flat cars, cane cars, sugar mill and equipment, cane conveyors, buildings, tools, implements, wagons and vehicles, growing crops, live stock, choses in action, franchises and all rights and privileges of said company and the good will of the same, conveying hereby all and every right, title and interest which the said company may have in and to every property and effects, whether the same be mentioned hereinbefore or not,

"To have and to hold the said and all of the personal and fee simple property unto the said Clinton J. Hutchins, Trustee, his successors and assigns, forever, and the said and all and every leaseholds and other interests of said company for and during the terms of years remaining yet to run and unexpired thereon, subject nevertheless to the covenants and agreements in said leases contained on the part of said company to be kept and performed.

"In witness whereof I have hereunto set my hand and seal the day and year first above written."

(Signed)

F. L. DORTCH,
Receiver Kona Sugar Co., Ltd.

Acknowledged on the 10th day of June, 1903, before Guy F. Maydwell, Notary Public, Third Circuit. Recorded on the 1088 17th day of July 1903 at 9:48 o'clock A. M.

THOMAS G. THRUM,
Registrar of Conveyances.

I hereby certify the within instrument to be a complete and accurate extension of my shorthand notes of the same as read in evidence on the trial of the case.

(Sig.)

J. L. HORNER,
Official Reporter.

Endorsed: L. 6023. Sent in Jury Room. Filed May 22nd, 1908, 9:50 P. M. Job Batchelor, Clerk.

1089 Defendants objected to the introduction in evidence of said deed upon the ground that the same is incompetent, irrelevant and immaterial, to which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

1090

Exception No. XXV.

Transcript of Ev., pp. 80-81.

Thereafter, for the purpose, as announced by counsel for plaintiff, of laying a foundation for the examination on behalf of plaintiff of one J. M. McChesney called as a witness for plaintiff, plaintiff offered in evidence a letter or agreement dated March 13th 1901

from W. W. Bierce, Limited, to Kona Sugar Company, Limited, said letter being in words and figures as follows, to wit:

Denominated Exhibit KK.

1091

"EXHIBIT B.

HONOLULU, H. I., *March 13, 1901.*

Kona Sugar Company, Limited, Honolulu, H. I.

GENTLEMEN: In pursuance of the verbal arrangement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company Limited and William W. Bierce, Limited, as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company, Limited, Feb. 22, 1900.

We will take in settlement of this contract the sum of \$10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of \$37,044.53, in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. ($7\frac{1}{2}\%$) per annum and secured by First Mortgage Bonds of the Kona Sugar Company, Limited, of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding \$200,000. This offer is conditioned upon its acceptance by you payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall

[RALPH C. SHAW,]*

[*Commissioner.*]*

1092 remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Very truly yours,
(Signed)

W. W. BIERCE, LTD.,
By H. T. GILBERT.

[RALPH C. SHAW,]*

[*Commissioner.*]*

The above terms are accepted this March 13th, 1901.

THE KONA SUGAR CO., LTD.,
By Its President, J. M. McCHESNEY.
By Its Treasurer, F. W. McCHESNEY.

[* Words enclosed in brackets erased in copy.]

Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy-Six (76) \$500—Bonds of the Kona Sugar Co.—numbered from 1 to 76 both inclusive.

(Signed)

W. W. BIERCE, LTD.,

By H. T. GILBERT.

[RALPH C. SHAW,]*

[*Commissioner.*"]*

1093 Defendants objected to the introduction of said letter as incompetent, irrelevant and immaterial, which objection was by the court overruled, and said letter received in evidence, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

1094

Exception No. XXVI.

Transcript of Ev., p. 81.

Immediately thereafter and upon the direct examination by plaintiff of said witness, J. M. McChesney, the following proceedings were had:

"MR. PROUTY:

"Q. Mr. McChesney, where, if you know, was the property mentioned and described in this agreement at the time it was executed on March 13, 1901?

"A. It was in Honolulu, I believe; I believe it was in Honolulu at that time.

"Q. You saw it, did you, at about that time?

"A. Yes sir.

"Q. And where was it located then?

"A. On the wharf, near where the Inter Island wharves are now I believe."

All of which testimony was received in evidence by the court under and objection that the same was incompetent, irrelevant and immaterial, to which ruling of the court admitting said evidence, the said defendants then and there duly excepted, which ruling of the court is here and now assigned as error by said defendants.

Exception No. XXVII.

Transcript of Ev., pp. 86-87.

Thereafter and on examination of the witness J. M. McChesney, counsel for defendants asked the said witness the following question:

"Q. In laying the rails of the railway on the lands there did you notify anyone on whose lands you laid it of the contents of the document of March 13th 1900-1901?

[* Words enclosed in brackets erased in copy.]

"Mr. PROUTY: I object to the question.

"The COURT: I fail to see where it is material or even cross examination; objection sustained."

To which ruling of the court, sustaining said objection, defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

1095

Exception No. XXVIII.

Transcript of Ev., pp. 89-90-91.

Thereafter plaintiff asked leave to amend the amended complaint herein on the first line on the 5th page, by substituting the word thirty for twenty-two, and also striking out the words "together with interest thereon from the 19th day of March, 1904," so that paragraph 11 would read, "the plaintiff has been damaged in the premises in the sum of \$30,000." Plaintiff also then and there asked leave to make a corresponding amendment to the prayer of the complaint in the seventh line of the 5th page of the amended complaint, substituting the figures \$30,000 for \$22,000, and striking out the words "together with interest thereon from March 19th, 1904," in order to conform with the proof.

Whereupon the following proceedings were had:

"Mr. CATHCART: I thought he made the total \$28,154,—something like that.

"The COURT: \$28,178.64.

"Mr. PROUTY: That is satisfactory to us; put in the exact figures.

"The COURT: I suppose you will have to be governed by the proof.

"Mr. ROBERTSON: So that our motion then is, instead of substituting 30 for 22 in the first and seventh lines of the fifth page, we ask leave to substitute \$28,156.74 instead of \$22,000.

Defendants objected to the proposed amendment upon the grounds that said amendment and every matter and thing connected with the same had transpired since the institution and filing of the suit; that it is not permissible at the time said amendment was offered to make such an amendment; that the complaint as amended must stand for and be considered as the amendment as of the date of the filing or consideration of the complaint, and that the matters and things that plaintiff was at the time of said proposed amendment taking into consideration had happened subsequent to the filing of the complaint and subsequent to the time the judgment was given.

1096 Whereupon the court allowed the amendment by inserting \$28,156.74 in lieu of \$22,000, and by striking out the words "together with interest thereon from March 19th 1904" to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. XXIX.

Transcript of Ev., pp. 91-92.

Thereafter, and said plaintiff having rested his case, counsel for defendants moved the court to strike out from the evidence in the case the creditor's claim against the estate of Henry Waterhouse, deceased, introduced in evidence in this case dated September 6th 1904, purported to have been presented against the executors of Henry Waterhouse, deceased, and also the second claim purported to have been presented against the executors of Henry Waterhouse, deceased, dated September 30th 1904, and all evidence in the case relative thereto on the following grounds: That since the introduction of the evidence, with the claims and the evidence relating thereto, the deposition of Columbus Bierce on interrogatories has been read in evidence, and it appears from such evidence, given in answer to cross interrogatories, that the claim as introduced was subscribed and sworn to and presented by S. H. Derby, as attorney in fact for William W. Bierce, Limited, both claims, one dated September 6th and one dated September 30th 1904, and Mr. S. H. Derby was totally unauthorized to act for and as the attorney in fact of Columbus Bierce and consequently the actions of Mr. Derby were entirely unauthorized and cannot be held to be for and on behalf of or as the acts of William W. Bierce, Limited, consequently the claim and all reference thereto should be stricken out.

The court thereupon denied said motion to strike, to which 1097 ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. XXX.

Transcript of Ev., pp. 93-94-95-96.

Thereafter the plaintiff having closed his case, and before the introduction of any evidence on behalf of the defendants counsel for defendants made the following motion for a non suit:

1098 "Afternoon Session, May 12th, 1908.

"Mr. LEWIS: At this time, plaintiff having closed its case, I desire on behalf of the defendants William Waterhouse and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, to move for a non-suit on the following grounds:

First. The sureties, and particularly the sureties represented by William Waterhouse and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, and Mr. Waterhouse, particularly applying to Mr. Henry Waterhouse in his lifetime, having executed a redelivery bond conditioned on the affidavit of plaintiff in the replevin action, and the complaint of plaintiff set-

ting forth the actual value of the property sought to be replevined at \$15,000, and the fact that the complaint in said replevin action was thereafter amended to show, first the actual value of \$20,000, and, second, said complaint was thereafter again amended in said action to show a value of \$22,000 and the judgment in said action thereafter rendered for \$22,000, the surety was thereby released by said amendments under the circumstances.

Second. The cause of action alleged in the complaint in the replevin action at the time of the execution and delivery of the redelivery bond was by subsequent events changed and judgment was rendered on the amended cause of action, the sureties thereby released.

Third. The property sought to be replevined had not been seized by the sheriff according to the statute at the time of the delivery of the redelivery bond, and the sureties consequently not liable under the bond.

1099 Fourth. The judgment of May 6th, 1905, by the supreme court of the Territory of Hawaii in the replevin action of Bierce against C. J. Hutchins, trustee, released the defendant sureties in this action.

Fifth. If such judgment did not release the sureties, then such judgment at least makes the commencement of this action on the bond premature.

Sixth. Or at least shows that no proof has been introduced by plaintiff's testimony showing breach of conditions of bond by defendant Hutchins, trustee.

Seventh. This action on the bond cannot be maintained as no claim has been presented to or suit brought against the executors under the will and of the estate of Henry Waterhouse, deceased, according to the statute relative to claims against the estates of decedents.

Eighth. This action on the bond is prematurely brought against the executors under the will and of the estate of Henry Waterhouse, deceased.

Ninth. This action was prematurely brought against all parties defendant.

Tenth. The sureties are released by change of venue from the third circuit to the first circuit court of the Territory of Hawaii without the consent of the sureties in the replevin action of Bierce against Hutchins, trustee.

Eleventh. The sureties are released by waiver of a jury trial by plaintiff in the replevin action of Bierce, Ltd., against Hutchins, trustee.

1100 Twelfth. The surety represented by the executors under the will and of the estate of Henry Waterhouse, deceased, is released by the discontinuance of this case as to C. J. Hutchins, trustee, and A. B. Wood.

(Argument.)"

1101

"MAY 13, 1908.

"(Continuation of argument.)

"Mr. LEWIS: I desire to amend one of the grounds of the motion

for non-suit to read as follows: No. 4, the decision of January 28th, 1905, of the supreme court of the Territory of Hawaii in the case of Bierce versus Hutchins, Trustee, being the replevin suit, and, or the judgment of May sixth 1905 of the supreme court of the Territory of Hawaii in said suit released the defendant sureties; and also desire to add the following grounds that have been covered by argument: The sureties are not bound by any act or proceeding had by virtue of the amendments of March 3rd, 1905, of the Organic Act."

1102 Thereupon said motion of defendants for a non suit was by the court denied, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

1103 *Exception No. 31.*

Transcript of Ev., p. 117.

Thereafter John W. Cathcart is called as a witness on behalf of the defendants, and, on cross examination by counsel for the plaintiff, was asked the following question.

"Q. Mr. Cathcart, didn't you receive other letters from Kinney, McClanahan & Cooper in reference to the replevin suit?"

Counsel for defendants objected to the question as being irrelevant, incompetent and immaterial, and indefinite as to time.

Whereupon the court overruled said objection, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 32.

Transcript of Ev., p. 118.

Thereafter the said witness John W. Cathcart is further asked on cross examination by counsel for the plaintiff the following question:

"Q. Didn't you, as a matter of fact, have negotiations with Mr. McClanahan, subsequent to the last letter which you have offered in evidence here as Exhibit 8, and which is dated May 27th, 1904?"

Counsel for defendants objected to said question as being incompetent, irrelevant and immaterial, and not proper cross examination.

Whereupon the following proceedings were had:

"Mr. PROUTY: Wait a minute. Well, didn't you have conversations with Mr. McClanahan about a settlement of the Bierce case?"

"Mr. LEWIS: Object to that as incompetent, irrelevant, and immaterial."

1104 "Mr. PROUTY: Subsequent to the correspondence?"

"A. About a settlement?"

Whereupon the Court overruled the objections to said questions, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 33.

Transcript of Ev., p. 122.

Thereafter the following proceedings were had:

Mr. PROUTY: I offer the copy in evidence, if Your Honor please," (referring to a letter press copy of a letter purporting to be by Kinney, McClanahan & Cooper to Clinton J. Hutchins, Trustee, dated April 26, 1904).

"Mr. Lewis steps up to speak to the witness, Mr. Cathcart."

"Mr. PROUTY: If Your Honor please, I object to counsel examining the witness unless it is done openly before the jury."

"The COURT: I think it is improper."

"The WITNESS: I am one of the attorneys in the case, Your Honor."

"The COURT: That does not make any difference. You cease to be an attorney when you are on the witness stand, as I understand it. I don't think there should be an- consultation between the attorneys and the witnesses, any secret consultation; I don't think it is proper. Whenever a party takes the stand, no matter what his capacity in the case may have been before, that capacity ceases for the time being and he becomes a witness."

Whereupon said defendants then and there duly excepted to the remarks of the Court as set out herein, and said remarks are here and now assigned as error by said defendants.

1105

Exception No. 34.

Transcript of Ev., 123.

Plaintiff then offered in evidence said letter press copy of a letter purporting to be by Kinney, McClanahan & Cooper to Clinton J. Hutchins, Trustee, dated April 26th, 1904, said copy being in words and figures as follows, to wit:

1106

326.

315.

APRIL 26TH, 1904.

Clinton J. Hutchins, Trustee, City.

DEAR SIR: Without prejudice to our claim now made or which may hereafter be made that you have not made a re-delivery to William W. Bierce Limited of the proerty which is the subject matter of the action in replevin brought by William W. Bierce Limited against you, we for William W. Bierce Limited do make you the following offer.

In the event of our receiving from you an actual re-delivery of the railroad and its appurtenances, the subject matter of the above mentioned suit, we will sell the same to you at any time within 30 days from this date for the sum of \$19,000 Gold Coin, you to take

the delivery of said property from us as it now lies and is situate at Kailua, Hawaii. Said \$19,000 being net to our client and to be paid here in Honolulu to its authorized attorney in fact.

Respectfully yours,

KINNEY, McCLANAHAN & COOPER.
E. B. M.

This option of course is subject to the one previously given to the Kapiolani Estate Ltd.

KINNEY, McCLANAHAN & COOPER.
E. B. M.

Endorsed: L. 6023. Plaintiff's Exhibit L. L. Law No. 6023. Plaintiff's Exhibit L. L. Filed May 14th, 1908. Job Batchelor, Clerk.

1107 Defendants objected to the introduction of said letter as being incompetent, irrelevant and immaterial, and further objected upon the ground that said letter did not relate to any matter involved in this action, but appeared to relate to some attempted compromise.

Said objection was overruled by the Court, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 35.

Transcript of Ev., pp. 134-210-211-212-213.

Thereafter one M. F. Scott was called as a witness on behalf of the defendants, and on direct examination of said witness the following proceedings were had:

"Q. I hand you documents endorsed 'In the Circuit Court of the Third Circuit, M. W. McChesney & Sons vs. Kona Sugar Company, Ltd., et al., Petition,' and file marked 'Filed May 20, 1902, J. B. Curtis, Clerk.' Ask you if you have seen them before?"

"A. Yes, I have seen it; shall I tell you what it is?"

"Q. Can you state who prepared that document?"

"A. It was sent——"

"Q. Look it over and see if you can state who prepared it?"

"A. It was prepared and sent to me by the firm of——"

"Mr. PROUTY: I object to the statement 'It was sent to him,' he didn't know who prepared it, by the firm of anybody."

"Mr. CATHCART:

Q. How did you receive it?"

"A. It came to me from the office of Kinney, Ballou & McClanahan by the hand of Cecil Brown."

"Said letter was marked 'Exhibit 9' for identification."

Whereupon counsel for plaintiff moved that so much of
1108 the answer of said witness Scott wherein he stated that he
received the instrument marked for identification "No. 9,"
from the office of Kinney, Ballou & McClanahan, be stricken out.

Whereupon the Court granted said motion to strike, to which
ruling of the Court defendants then and there duly excepted, and
said ruling is here and now assigned as error by said defendants.

Exception No. 36.

Transcript of Ev., pp. 145-219-220.

Therefore, and on further direct examination of the said witness
Scott, counsel for defendants asked said witness the following question:

"Q. Did you have any conversation with the sheriff down there
at the time in question, between the 21st day of May, 1904, and the
23rd day of May, 1904, or with his officers, in reference to this
property; if so, state what it was?"

Whereupon counsel for plaintiff objected to the question as incompetent
for the purpose of contradicting the sheriff's return on the
execution, whereupon the following proceedings were had:

"Mr. CATHCART: Particularly to avoid any question of that I
will add to the question:"

"Q. Before you met Mr. Cooper and Mr. Nahale on the Monday
when you served that notice on them?"

"A. Yes sir."

"Q. State what it was?"

"Mr. PROUTY: Objection on the same ground."

"A. Mr. Nahale says——"

"Mr. CATHCART: Well, I will make it prior to that date?"

"The COURT: How will it be binding on the plaintiff; it is to be
presumed that he performed his duty, and how can you attack it;
if you can attack it, why it strikes me that it would be im-
1109 proper. I think the objection is well taken."

To which ruling of the Court sustaining said objection said
defendants then and there duly excepted, and said ruling is here
and now assigned as error by said defendants.

Exception No. 37.

Transcript of Ev., p. 220.

Immediately thereafter the following proceedings were had:

"Mr. CATHCART: I would like to make an offer to prove by the
witness" (M. F. Scott) "that the officer on the 21st day of May,
1904, came to him and asked him if he was going to object to the
rails being taken up off any of his land, stating that he had been
sent to get objections from persons to the removal of the rails."

"Mr. PROUTY: We object to the offer."

"The COURT: The jury will disregard the offer, of course, not being evidence."

"Mr. PROUTY: I object to the offer."

"The COURT: Well, you have already objected to the question. He just merely puts it in the form of an offer."

"Mr. CATHCART: What ruling was there on it?"

"The COURT: I say I have directed the jury to disregard it; of course the objection is sustained."

Defendants thereupon then and there duly excepted to the ruling of the Court sustaining said objection, and said ruling is here and now assigned as error by said defendants.

Exception No. 38.

Transcript of Ev., pp. 221-222-223.

Thereafter counsel for defendants offered in evidence the document of Kinney, McClanahan & Cooper, marked for identification "Exhibit 9," hereinabove referred to, and a document
1110 endorsed "In the Circuit Court, Third Circuit, M. W. McChesney & Sons vs. Kona Sugar Company, Ltd., et al., Order," filed marked "Filed May 21, 1902, J. B. Curts, Clerk," and marked for identification "Exhibit 10," said Exhibits 9 and 10 being in words and figures following, to wit:

1111 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii.

At Chambers. In Equity.

M. W. McCHESNEY & SONS, Plaintiff,

vs.

KONA SUGAR CO., LTD., and FIRST AMERICAN SAVINGS & TRUST CO. OF HAWAII, LTD., Trustee, Defendants.

Petition of M. F. Scott, Receiver, for Order Fixing Priority of Payment of Claims of Creditors.

To the Honorable W. S. Edings, Judge of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, sitting at Chambers in Equity:

Your petitioner, M. F. Scott, Receiver, respectfully represents and shows to this Honorable Court as follows:

First: That petitioner is the duly appointed and qualified receiver of the Kona Sugar Co. Ltd., acting under and by virtue of an order of this Honorable Court made in the above entitled cause on the 28th day of March, 1902.

Second. That a large majority of the creditors of the Kona Sugar Co. Ltd., have entered into an agreement under the terms of which Mr. S. M. Damon, Mr. Cecil Brown and Mr. J. F. Humburg were

appointed and are now a Committee representing the interests of said creditors in relation to their several claims against the said company. A copy of which said agreement being hereto attached 1112 marked Exhibit "A," referred to and made part of this petition.

Third. That under and by virtue of the authority given to said Damon, Brown and Humburg by said agreement they have, as such Committee and acting for said creditors, parties to said agreement, signified their consent that your petitioner, upon securing the property authority from this Honorable Court, may sell sugars manufactured at the mill of the said Kona Sugar Co. Ltd., and make disposition of the proceeds of such sale or sales in the manner and priority as the same is set forth in said consent, a copy of which is hereto attached, marked Exhibit "B," referred to and made part hereof.

Fourth. That your petitioner believes it to be to the best interests of all interested parties and necessary in order to pay the claims held against said Kona Sugar Co. Ltd. that the cane crop for the year 1903 be cultivated, cared for, harvested and manufactured into sugar and that at least five hundred (500) acres, but not more than one thousand (1000) acres of the land of said Company be prepared and planted for the cane crop of 1904 which, in order to accomplish matters which are for the best interests of said Company, its creditors and stockholders, should be cultivated, cared for, harvested and manufactured into sugar.

Fifth. That your petitioner believes it to be for the best interests of all interests- parties that payment of claims against said Kona Sugar Co. Ltd., be made in the priority named in said Exhibit "B."

Wherefore petitioner prays that an order issue out of this Honorable Court empowering and directing this petitioner, as receiver of the Kona Sugar Co. Ltd., to cultivate, care for, harvest and manufacture a sugar cane crop of said Company for the year 1903 and prepare and plant a crop of not less than five hundred (500) 1113 acres nor more than one thousand (1000) acres for the year 1904, and cultivate, care for, harvest and manufacture the sugar therefrom. And upon making sales of such sugars so to manufactured, from the proceeds thereof to at all times pay and keep the necessary expenses or carrying on the plantation and operating the mill of the said Company situate thereon, including the expenses for rent, taxes, wages, salaries and necessary supplies and repairs, applying the surplus:

(1) To or towards the payment of the sum or sums now due to labor contractors and employees of the Company, on labor contracts and for back labor, until the entire liquidation of such indebtedness;

(2) To or towards the payment of L. M. Whitehouse and L. Vasconcelles in full for moneys due or to grow due under their respective railroad contracts with the said Kona Sugar Co. Ltd., and of Albert Horner for royalties for the use of said Horner's patent cable carrier, until such indebtedness is completely liquidated;

(3) To or towards the payment of rent now due the several lessors of the Kona Sugar Co. Ltd., and government taxes, until such indebtedness is completely liquidated;

(4) To or towards the payment of the amount of the claims of skilled mechanics and material men who have filed or may file liens against the property of the said Kona Sugar Co. Ltd., until such indebtedness is completely liquidated;

(5) To or towards the payment of the amount of the claims of general creditors of the Kona Sugar Co. Ltd., and the interest at the time due on the bonds of the Kona Sugar Co. Ltd. until such indebtedness is completely liquidated.

Said surplus moneys to be paid to the several creditors
1114 composing the foregoing classes pro rata and in proportion to the amount of their respective claims.

And your petitioner will ever pray.

(Sig.)

M. F. SCOTT.

Dated this 20th day of May, 1902.

TERRITORY OF HAWAII,
Island of Hawaii:

M. F. Scott being duly sworn deposes and says that he is the petitioner in the above cause, that he has read the same and knows the contents thereof, that the allegations there contained are true, except wherever stated to be on information and that he believes the same to be true.

(Sig.)

M. F. SCOTT.

Subscribed and sworn to before me this 21st day of May, A. D. 1902.

(Sig.)

[SEAL.]

J. P. CURTS,

Clerk 3rd Circuit Court.

1115

EXHIBIT "A."

Whereas in a suit in equity brought in the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, before the Honorable W. S. Edings, at Chambers in Equity, by M. W. McChesney & Sons against the Kona Sugar Co. Ltd., and the First American Savings and Trust Co. of Hawaii, Limited, trustee; one M. F. Scott was appointed receiver of the defendant the Kona Sugar Co. Ltd., and is at this time acting as such receiver, and

Whereas the persons, firms, and corporations signing this agreement, parties hereto, are creditors of the said Kona Sugar Co. Ltd., and are desirous of acting in harmony and unison in the carrying out of a general plan under which the affairs and business of the said Kona Sugar Co. Ltd., under the management of the said receiver, shall be so conducted as to work to the best interests of all parties hereto, and

Whereas it is recognized and appreciated by the parties hereto that under the circumstances now existing unity and harmony of action on the part of the creditors of said company will alone secure the payment of all claims against the said Company, and

Whereas this agreement has in view the continuance of the business of the said Company and the speedy liquidation and settlement without further litigation of all claims held by creditors, both secured and unsecured, against the said Kona Sugar Co. Ltd.,

Now therefore this agreement, made and entered into this 15th day of May, A. D. 1902, by and between the bondholders, lessors, lienholders and general creditors, both secured and unsecured, of the Kona Sugar Co. Ltd.;

Witness-th: That for and in consideration of the mutual covenants herein contained the parties hereto who are the holders
1116 of the bonds of the Kona Sugar Co. Ltd., and the parties hereto who are the lessors of the Kona Sugar Co. Ltd., and the parties hereto who are creditors of the Kona Sugar Co. Ltd., and hold mechanic's and material man's liens against the property of tje Kona Sugar Co. Ltd., and the parties hereto who are general creditors, both secured and unsecured of the Kona Sugar Co. Ltd. agree and covenant, each with the others, as follows, that is to say:

That S. M. Damon, Cecil Brown, [J. F. H]* and J. F. Humburg, all of the City of Honolulu, are hereby appointed a committee advisory and of inspection on behalf of all the parties hereto of the business and affairs of the Kona Sugar Co. Ltd., and of the management and conduct of said business and affairs by the said receiver.

That this Committee, under authority of this agreement, is given power and is directed to enter into such an agreement, contract or stipulation as to them may seem appropriate with the said M. F. Scott, receiver of the said Kona Sugar Co. Ltd., or his successor or successors in office, or to consent to such an order in the said suit under and by virtue of which agreement, contract, stipulation or order said receiver is to make sales of the sugars to be manufactured by him as receiver and from the proceeds therefrom to at all times pay and keep paid the necessary expenses of carrying on the plantation and operating the mill of the said Company situate thereon, including the expenses for rent, taxes, wages, salaries necessary supplies and repairs, applying the surplus;

(1) To or towards the payment of the sum or sums now due to labor contractors and employees of the Company, on labor contracts and for back labor, until the entire liquidation of such indebtedness;

(2) To or towards the payment of L. M. Whitehouse and L. Vasconcelles in full for moneys due or to grow due under
1117 their respective railroad contracts with the said Kona Sugar Co. Ltd., and of Albert Horner for royalties for the use of said Horner's patent cable carrier, until such indebtedness is completely liquidated;

(3) To or towards the payment of rent now due the several lessors of the Kona Sugar Co. Ltd., and government taxes, until such indebtedness is completely liquidated;

(4) To or towards the payment of the amount of the claims of skilled mechanics and material men who have filed or may file liens

[* Words enclosed in brackets erased in copy.]

against the property of the said Kona Sugar Co. Ltd., until such indebtedness is completely liquidated;

(5) To or towards the payment of the amount of the claims of general creditors of the Kona Sugar Co. Ltd., and the interest at the time due on the bonds of the Kona Sugar Co. Ltd., until such indebtedness is completely liquidated.

Provided however, that as between the parties comprising each one of the classes aforesaid, they shall be entitled to and shall be paid, such share of the surplus moneys in the hands of the receiver pro rata and in proportion to their respective claims.

That such consent as in hereinbefore directed to be given is to be upon the condition that the said receiver is to cultivate, care for, harvest and manufacture the sugar from the sugar cane crop of the said Company for the year 1903, and to prepare and plant a crop of not less than five hundred (500) acres and not more than One Thousand (1,000) acres, for the year 1904, and cultivate, care for, harvest and manufacture sugar therefrom.

It is also mutually understood and agreed that the powers and duties of the said Committee herein provided for and appointed shall be to examine and inspect from time to time the condition of the plantation of the said Kona Sugar Co. Ltd., and to inspect and supervise the conduct and management by the said receiver of the business and affairs of the said Company and to report thereon. To this end said Committee is authorized, empowered and directed to select and employ a competent man, who shall be paid a salary of not to exceed fifty dollars (\$50) per month by the signatories to this agreement, (each party paying an amount pro rata to the amount of their several and individual claims against the said Company) who shall report to the said Committee.

Said Committee to have power, and is hereby directed, to organize by the selection of a Chairman, Secretary and Treasurer and hold stated meetings. And it is agreed that any member of said Committee resigning his place as said Committeeman, may appoint any person as his successor provided such appointment be with the approval of the remaining two members of the Committee, and such now appointee and successor shall have all the powers under this agreement conferred on any of the members named herein.

It is also further understood and mutually agreed that so long as this agreement shall remain in force the lawful and authorized acts and doings of said Committee hereunder, when made by a majority of its members, shall be binding and effective as against the respective parties hereto.

It is further mutually agreed and understood that any of the parties hereto shall be at liberty to withdraw from this agreement at any time hereafter by giving written notice of his or its withdrawal to the Chairman of said Committee, and thereupon such person shall be free from further liability hereunder, but such withdrawal so made shall in nowise affect the binding force and obligation resting upon the remaining parties hereto, and Provided that no withdrawal

1119 of any of the parties hereto shall in anywise affect the acts and things done hereunder prior to such withdrawal. It being mutually understood and agreed that all such acts and things done prior to such withdrawal are binding upon the party so withdrawing.

It is also mutually understood and agreed that the entering into this contract shall under no circumstances and in no event be deemed a waiver or a denial of the right of the several parties to intervene in the aforesaid suit against the said Kona Sugar Co. Ltd. for any cause or causes or to withdraw herefrom without liability or give the said Committee the right to pledge the credit of the said parties hereto except for his, their or its pro rata share of the expenses authorized herein, and that said Committee has no authority to bind the parties hereto or any one of them by contract or otherwise, to an acquiescence in any of the acts or doings of the said M. F. Scott as such receiver, except as set forth and contained in these presents.

Provided however that nothing herein contained shall be deemed a waiver by any of the parties hereto of their rights as holders of liens against the Kona Sugar Co. Ltd., or the assets thereof or shall bar them from instituting such legal proceedings as by statute it shall be incumbent upon them to institute to protect and preserve such liens.

Provided further that nothing herein contained shall be construed to constitute the parties hereto partners or that these presents constitute articles creating a partnership.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

[SEAL.]

THE FIRST AMERICAN SAVINGS & TRUST CO. OF HAWAII, LTD.,

By Its President, CECIL BROWN.

[SEAL.]

THE FIRST NATIONAL BANK OF HAWAII, AT HONOLULU,

By Its President, CECIL BROWN.

BISHOP & CO.

[SEAL.]

M. W. McCHESNEY & SONS,

H. HACKFELD & CO., LMD.

J. F. HUMBURG, *Director*,

[SEAL.]

WILLIAM W. BIERCE, LTD.,

By KINNEY, BALLOU & McLANAHAN,

Its Attorneys.

1120

KAPIOLANI ESTATE LTD., [SEAL.]

Lessor of Mill Cite.

Per JOHN F. COLBURN, *Treasurer*,

CASTLE & COOKE, LTD.,

E. D. TENNEY, *Secretary*,

C. BREWER & COMPANY, LTD.,

By GEO. H. ROBERTSON, *Manager*, [SEAL.]

OOKALA SUGAR PLANT'N CO.,

By Its Treas'r, GEO. H. ROBERTSON,

A. HORNER,

By H. HACKFELD & CO., LTD., [SEAL.]

J. F. HUMBURG, *Director.*

S. C. ALLEN.

Rea. E. MAYNARD.

RISDON IRON WORKS.

By E. P. JONES.

E. C. GREENWELL.

By FRANK E. GREENWELL.

FRANK HUSTACE,

JOS. KOSICK,

BAKER & HAMILTON,

By C. S. TEAFF.

JOHN D. PARIS,

W. H. SHIPMAN,

W. H. JOHNSON,

J. D. JOHNSON,

Mrs. E. ROY,

Per J. D. PARIS.

Mrs. HANNAH PARIS.

Per J. D. PARIS.

SOUTH KONA AGRI. CO., LTD.,

By Its Treasurer, A. N. CAMPBELL. [SEAL.]

HAWAIIAN NAVIGATION CO., LTD.,

By Its Treasurer, A. N. CAMPBELL. [SEAL.]

L. M. WHITEHOUSE.

By ROBERT HAEXHURST.

His Attorney-in-fact

L. VASCONCELLES.

M. F. SCOTT.

JAS. COWAN.

1121

EXHIBIT "B."

To M. F. Scott, Receiver of the Kona Sugar Co. Ltd., Kailua, Hawaii.

DEAR SIR: Under and by virtue of the power and direction contained and set forth in an arrangement made between certain creditors of the Kona Sugar Co. Ltd., dated May 15th, 1902, a copy of which agreement is hereby attached and referred to, we, the members of the Committee provided for in said agreement, as a committee, and for and on behalf of the signatories to said agreement, do by this letter give to you as the receiver of the Kona Sugar Co. Ltd., our consent to (under proper order of Court) make sales of the sugars to be manufactured by you as the receiver of said Company and from the proceeds of such sales to at all times pay and keep paid the necessary expenses of carrying on the plantation and operating the mill of the said Company situate thereon, including the expenses for rent, taxes, wages, salaries and necessary supplies and repairs, applying the surplus;

(1) To or towards the payment of the sum or sums now due to labor contractors and employees of the Company, on labor con-

tracts and for back labor, until the entire liquidation of such indebtedness;

(2) To or towards the payment of L. M. Whitehouse and L. Vasconcelles in full for moneys due or to grow due under their respective railroad contracts with the said Kona Sugar Co. Ltd., and of Albert Horner for royalties for the use of said Horner's patent cable carrier, until such indebtedness is completely liquidated;

(3) To or towards the payment of rent now due the several lessors of the Kona Sugar Co. Ltd., and government taxes, until such indebtedness is completely liquidated;

(4) To or towards the payment of the amount of the 1122 claims of skilled mechanics and material men who have filed or may file liens against the property of the said Kona Sugar Co. Ltd., until such indebtedness is completely liquidated;

(5) To or towards the payment of the amount of the claims of general creditors of the Kona Sugar Co. Ltd., and the interest at the time due on the bonds of the Kona Sugar Co. Ltd. until such indebtedness is completely liquidated.

Such surplus moneys to be paid to the several creditors composing the foregoing classes pro rata and in proportion to the amount of their respective claims.

This consent, however, being given upon the express condition that you obtain an order of Court directing, authorizing and empowering you to so make sales and so apply the receipts therefrom and provided further that such order directly authorize and empowers you as such receiver of the Kona Sugar Co. Ltd., to cultivate, care for, harvest and manufacture a sugar cane crop of said Company for the year 1903 and prepare and plant a crop of not less than five hundred (500) acres nor more than one thousand (1000) acres for the year 1904 and cultivate, care for, harvest and manufacture the sugars therefrom.

By reference to the attached copy of the agreement under which this Committee is acting in the premises you will be advised of the limitation of our power and authority to bind the parties thereto.

Respectfully yours,

S. M. DAMON,
By S. E. DAMON,
CECIL BROWN,
J. F. HUMBURG,

*Committee Representing Creditors of the Kona Sugar
Co. Ltd., under Agreement of May 15, 1902.*

Dated, Honolulu, T. H., May 16th, A. D. 1902.

Endorsed: Circuit Court, Third Circuit. M. W. McChesney & Sons vs. Kona Sugar Co. Ltd. et al. Petition of M. F. Scott. Filed May 20, 1902. J. P. Curts, Clerk. Kinney, Ballou & McClanahan, Judd Bldg.

Put in for identification by defendant & known as No. 9 having been identified are now offered in evidence. Counsel for Plaintiff objecting, court sustained the objection. Job Batchelor, Cl'k. May 14/08.

1123 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii.

At Chambers. In Equity.

M. W. MCCHESENEY & SONS, Plaintiff,

VS.

KONA SUGAR CO., LTD., and FIRST AMERICAN SAVINGS & TRUST CO. OF HAWAII, LTD., Trustee, Defendants.

Order.

M. F. Scott, temporary receiver of the Kona Sugar Co. Ltd., having filed and presented to this Court a petition praying to be authorized, empowered and directed to cultivate, care for, harvest and manufacture a sugar cane crop for the said Kona Sugar Co. Ltd., for the year 1903, and prepare and plant a crop of not less than five hundred acres nor more than one thousand acres for the year 1904, and cultivate, care for, harvest and manufacture the sugars therefrom, and for authority and direction to make sales of said sugars and from the proceeds of such sales to at all times pay and keep paid the necessary expenses of carrying on the plantation of the said Kona Sugar Co. Ltd., and operating the mill of the said Company situate thereon, including the expenses for rent, taxes, wages, salaries and necessary supplies and repairs, and for authority and direction to apply the surplus from such sales:

(1) To or towards the payment of the sum or sums now
1124 due to labor contractors and employees of the Company, on labor contracts and for back labor, until the entire liquidation of such indebtedness;

(2) To or towards the payment of L. M. Whitehouse and L. Vasconcelles in full for moneys due or to grow due under their respective railroad contracts with the said Kona Sugar Co. Ltd., and of Albert Horner for royalties for the use of said Horner's patent cable carrier, until such indebtedness is completely liquidated;

(3) To or towards the payment of rent now due the several lessors of the Kona Sugar Co. Ltd., and government taxes, until such indebtedness is completely liquidated.

(4) To or towards the payment of the amount of the claims of skilled mechanics and material men who have filed or may file liens against the property of the said Kona Sugar Co. Ltd., until such indebtedness is completely liquidated;

(5) To or towards the payment of the amount of the claims of general creditors of the Kona Sugar Co. Ltd., and the interest at the time due on the bonds of the Kona Sugar Co. Ltd., until such indebtedness is completely liquidated.

All of which will more fully appear from said petition, and the consent of the creditors and bondholders of said Kona Sugar Co. Ltd., having been shown and the Court being fully advised in the premises, and this Court believing it to be to the best interests of the

said Kona Sugar Co. Ltd., and all interested parties, it is hereby Ordered and Decreed that M. F. Scott, temporary receiver of the Kona Sugar Co. Ltd., be, and he hereby is authorized, empowered and directed to cultivate, care for, harvest and manufacture a sugar cane crop of the Kona Sugar Co. Ltd., for the year 1903 and prepare and plant such a crop for said Company of not less than *give* hundred (500) acres nor more than one thousand (1000) 1125 acres for the year 1904, and cultivate, care for, harvest and manufacture the sugars therefrom.

And the said M. F. Scott, temporary receiver of said Kona Sugar Co. Ltd., is further Ordered and Directed to make sales of such sugars as shall be so manufactured such sales to be in accordance with an order of this Court issued on the 28th day of April, 1902, and from the proceeds of such sale or sales to at all times pay and keep paid the necessary expenses of carrying on the plantation of the said Kona Sugar Co. Ltd., and operating the mill of the said Company situate thereon, including the expenses for rent, taxes, wages, salaries and necessary supplies and repairs, and said M. F. Scott, temporary receiver of said Kona Sugar Co. Ltd., is hereby ordered and directed, after the payment of said necessary expenses, to apply the surplus from any such sale or sales in the following order of priority:

(1) To or towards the payment of the sum or sums now due to labor contractors and employees of the Company, on labor contracts and for back labor, until the entire liquidation of such indebtedness:

(2) To or towards the payment of L. M. Whitehouse and L. Vasconcelles in full for moneys due or to grow due under their respective railroad contracts with the said Kona Sugar Co. Ltd., and of Albert Horner for royalties for the use of said Horner's patent cable carrier, until such indebtedness is completely liquidated;

(3) To or towards the payment of rent now due the several lessors of the Kona Sugar Co. Ltd., and government taxes, until such indebtedness is completely liquidated;

(4) To or towards the payment of the amount of the claims of skilled mechanics and material men who have filed or may file liens against the property of the said Kona Sugar Co. Ltd., until such indebtedness is completely liquidated;

1126 (5) To or towards the payment of the amount of the claims of general creditors of the Kona Sugar Co. Ltd., and the interest at the time due on the bonds of the Kona Sugar Co. Ltd., until such indebtedness is completely liquidated.

And it is further Ordered and Decreed that in the payment of the several parties comprising the several classes aforesaid the said receiver shall pay from such surplus moneys as aforesaid the several claims of the classes aforesaid pro rata and in proportion to the amount of their respective claims.

(Sig.)

W. S. EDINGS,

*Judge of the Circuit Court of the Third Judicial Circuit,
Territory of Hawaii, Sitting at Chambers, in Equity.*

Dated, May 21, 1902.

Endorsed: Circuit Court, Third Circuit. M. W. McChesney & Sons vs. Kona Sugar Co., Ltd., et al. Order. Filed May 21, 1902 J. P. Curts, Clerk. Put in for identification by Defendant & known as No. 10 having been identified are now offered in evidence, Counsel for Plaintiff objecting. Court sustained the objection. Job Batchelor, Clerk. May 14/08.

1127 Whereupon counsel for plaintiff objected to said documents being received in evidence, on the ground that they were immaterial, irrelevant and incompetent for any purpose in this case; that they related to a time not only long prior to the judgment in the replevin suit, but even long prior to the beginning of the replevin suit, and has no possible bearing on it in any way whatever, and at a time when it does not appear in evidence that the firm of Kinney, Ballou & McClanahan were attorneys for Wm. W. Bierce, Ltd.

Whereupon the following proceedings were had:

"Mr. CATHCART: We will follow it up to show that fact."

"The COURT: How do you claim this has anything to do with this matter?"

"Mr. CATHCART: We want to show by this that the attorneys for the plaintiff, Kinney, Ballou & McClanahan, at the time knew where these rails were, knew the situation of them; that is prior, if the Court please, of course, to this suit, this present action, but that they were aware where they were; that they consented to them being there, they consented to the——"

"The COURT: That is, you proceed on the theory that the knowledge of a person prior to the existence of an agency is knowledge to the principal?"

"Mr. CATHCART: No, we will show the agency——"

"The COURT: After the agency comes into existence?"

"Mr. CATHCART: We will show the agency at this time."

"The COURT: Were they attorneys at that time for Bierce?"

"Mr. CATHCART: Yes, in this very proceeding."

"Mr. WITHINGTON: They were attorneys and had been attorneys and were at that time attorneys in fact, and if the Court please, were acting in that very proceeding as attorneys for Bierce."

"Mr. PROUTY: They were not attorneys in fact. Bigelow 1128 was not a member of the firm at the time that paper was filed."

"Mr. WITHINGTON: We will introduce the evidence of Wm. W. Bierce that they were, at this time."

"Mr. CATHCART: We will connect it up."

"The COURT: It is for the purpose of showing that they had knowledge of the property, the situation, and the conditions there?"

"Mr. CATHCART: The conditions there, yes, if the Court please."

Whereupon the Court sustained the objection of plaintiff, and refused to receive said documents in evidence, to which ruling of the Court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 39.

Transcript of Ev., pp. 153-223.

Thereafter, and on cross examination of the said witness M. F. Scott, the following proceedings were had:

"Mr. ROBERTSON:

"Q. Who was conducting that plantation after the receiver's sale?"

"A. Mr. E. E. Conant was in charge of the operations on the plantation."

"Q. I know, but who was the proprietor?"

To which question counsel for defendants objected, as being incompetent, irrelevant and immaterial, and not cross examination.

Said objection was by the Court overruled, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 40.

Transcript of Ev., pp. 157-223.

Thereafter, and on further cross examination of said witness M. F. Scott, by plaintiff, and referring to the property described in the aforesaid action of Wm. W. Bierce Ltd. vs. Clinton J. Hutchins, Trustee, the following question was asked of the said witness Scott:

"Q. And what happened about the end of 1906, what happened to this property in the latter part of 1906?"

To which question defendants objected on the ground that the same was incompetent, irrelevant and immaterial, not proper cross examination, and as carrying the matter down further than time referred to on cross examination.

Said objection of defendants was overruled by the Court, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 41.

Transcript of Ev., pp. 157-223.

Immediately thereafter, and on further cross examination of said witness Scott, the following proceedings were had:

"A. Well, I have no information. I sold out my interest in 1905, and knew nothing more regarding it except what I heard and what I saw. I did see the property in use in the latter part of 1906 and during 1907. By what right or authority, or by whom, I know nothing about."

"Q. Well, if you saw it being used you must have seen who was using it, didn't you?"

"A. Yes."

"Q. Who was using it——"

To which last question defendants objected on the ground that the same was incompetent, irrelevant and immaterial and not proper cross examination; which objection was by the Court overruled, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned
1130 as error by said defendants.

Exception No. 42.

Transcript of Ev., pp. 158-223.

Thereafter, and on further cross examination of the said witness M. F. Scott, the following proceedings were had:

"Q. Have you seen Mr. McStocker up there since 1906" (referring to the lands under the control of the Kona Sugar Co. Ltd., at Kona Hawaii).

"A. I have seen him there, yes, many times, a number of times."

"Q. What is that?"

"A. A number of times I have seen him."

"Q. Where did you see him?"

"A. I saw him sometimes at my house."

"Q. Yes?"

"A. And I saw him, once I was at the mill with him."

"Q. At the mill?"

"A. Yes."

"Q. Did he have any authority on those places that you know of?"

(No answer.)"

"Q. What was McStocker doing there?"

To which last question counsel for defendants objected on the ground that the same was incompetent, irrelevant and immaterial, not proper cross examination.

Said objection was by the Court overruled, to which ruling of the Court said defendants then and there duly excepted and said ruling is here and now assigned as error by said defendants.

Exception No. 43.

Transcript of Ev., pp. 159-225.

1131 Thereafter, and on further cross examination of the said witness Scott, the following proceedings were had:

"Q. Since 1906 this railroad has been used in connection with the mill, has it not?"

"A. It has."

"Q. And who has been using the mill?" (Referring to the mill of the Kona Sugar Co. Ltd. at Kona, Hawaii.)

"A. Well, I don't know, state the question again please?"

"(Question read.)"

"A. Well, of my own knowledge I don't know; I believe, my impression——"

"Q. Who appeared there in the exercise of authority; have you seen anybody show any authority there?"

Which last question was objected to by defendants as incompetent, irrelevant and immaterial, and as calling for the conclusion of the witness.

Said objection was overruled by the Court, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 44.

Transcript of Ev., pp. 160-225.

Thereafter, and on further cross examination of the said witness M. F. Scott, the following question was asked the witness Scott by counsel for plaintiff:

"Q. Well, did you ever see Mr. F. B. McStocker show authority about there?" (Referring to the said mill of the Kona Sugar Co. Ltd.)

Which question was objected to by defendants as incompetent, irrelevant and immaterial, not proper cross examination and as calling for the conclusion of the witness.

Said objection was by the Court overruled, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

1132

Exception No. 45.

Transcript of Ev., pp. 160-225.

Thereafter, and on further cross examination of the said witness M. F. Scott, the following proceedings were had:

"Q. You sold out to the Kona Development Company?"

"A. No, I did not; I sold out to Mr. Hutchins."

"Q. Hutchins?"

"A. Yes."

"Q. When was that?"

Which last question was objected to my counsel for defendants, on the ground that same was incompetent, irrelevant and immaterial, and not cross examination. Said objection was overruled by the Court, to which ruling of the Court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 46.

Transcript of Ev., pp. 165-225.

Thereafter, and on further cross examination of the said witness M. F. Scott, the following question was asked said witness by counsel for plaintiff:

"Q. By the way, what if any connection had Mr. Conant with this property" (the property of the Kona Sugar Co. Ltd.) "at this time"?

To which question the witness answered:

"A. Well, he had during the time the cane was being harvested he was employed by the Henry Waterhouse Trust Company, but their trust deed had terminated by its own terms and they had relinquished it. Mr. Conant had—I don't think had any——"

Whereupon the following proceedings were had:

"Mr. PROUTY: I will have to move to strike out witness' answer, that proposition that the trust deed had terminated by its own
1133 terms, as not being the best evidence, and not responsive to the question."

"The COURT: Very well, it may be stricken out."

"Mr. CATHCART: We move to strike out all of the answer on the ground that it is not responsive to the question."

"The COURT: I think the first part of that answer is responsive. It may stand."

To which ruling of the Court refusing to strike out all of said answer said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 47.

Transcript of Ev., pp. 178-226.

Thereafter and on further cross examination of the witness M. F. Scott, by counsel for plaintiff, the following proceedings were had:

"Q. Didn't you attempt to go on there" (referring to the railroad of the Kona Sugar Co. Ltd. at Kona, Hawaii), "and he" (Robert Colburn) "made you skidoo?"

"A. No, I didn't attempt; I went on there many times, when it was necessary, and at all times while I was interested there, before this time and after it. I went into the mill when it was necessary to go there, to get other things, other property that belonged to Hutchins, Trustee, and also I went up to the store building on Kahului II. and I unlocked the door and had the combination of the safe and the key of the inner door."

"Q. When was that?"

"A. That was in—it was after this time." (Referring to the time witness testified that one Robert Colburn was on the premises.)

"Mr. ROBERTSON: Well, I move to strike that answer out. It is not responsive to the question."

Whereupon the Court struck out said answer, to which
1134 ruling of the Court the defendants then and there duly excepted and said ruling is here and now assigned as error by said defendants.

Exception No. 48.

Transcript of Ev., 178-226.

Thereafter, and on the further cross examination of the witness M. F. Scott, by counsel for plaintiff, the following question was asked:

"Q. But in May, 1904, he" (one J. D. Paris) "thought that some of the Bierce property or some of the Bierce rails were on his lands, is that what you mean?"

Said question was objected to by defendants on the ground that what Mr. Paris thought was absolutely immaterial to any issue in this case.

The Court overruled said objection, to which ruling of the Court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 49.

Transcript of Ev., pp. 187-227.

Thereafter, and upon further cross examination of the said witness M. F. Scott, by counsel for plaintiff, the following question was asked:

"Q. Do you mean to say you are not aware of that fact" (that of a judgment for some seven hundred and odd dollars for costs in the appeal of the said case of Wm. W. Bierce Ltd. vs. Clinton J. Hutchins, Trustee), "is that it, Mr. Scott?"

"A. Well, my recollection of it is that I executed that bond for what it purports to be, and was told that it was rejected and another bond in lieu of this one for the sum of twenty—forty thousand, was executed by Mr. Hutchins, on which there were other bondsmen, which I couldn't have qualified on; I couldn't have qualified
1135 on that bond, and I was told that that was substituted in lieu of this one, and I didn't know that this one was valid."

Whereupon counsel for plaintiff moved to strike out the answer of the witness, on the ground that it was not responsive to the question, and thereupon the Court struck out said answer, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 50.

Transcript of Ev., pp. 189-227.

Thereafter, and on re-direct examination of the said witness M. F. Scott, by counsel for defendants, the following question was asked said witness:

"Q. Now, state if you can, how you know that, that knowledge of or information that none of the rails of the Bierce Co. Ltd. were on these Paris lands or the lands which Paris held control of?"

Which said question was objected to by plaintiff on the ground that it was incompetent to prove notice conveyed by a record by parole evidence, which objection was by the Court sustained, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 51.

Transcript of Ev., pp. 189-227-240.

Thereafter, and upon the further re-direct examination of the said witness M. F. Scott, the following proceedings were had:

"Mr. CATHCART: In connection with the re-direct examination of Mr. Scott at this point, if the Court, please, I desire to offer
1136 in evidence and to read in evidence from the record of the replevin suit, transcript of the record of the replevin suit, of the Supreme Court of the United States, page 94, showing the evidence that was introduced in that case in reference to these rails on the so-called Paris land."

"(Objected to by plaintiff, objection overruled.)"

Mr. Cathcart thereupon read said evidence as follows:

1137 "Direct examination of M. F. SCOTT, called and sworn.

Mr. McCLANAHAN:

Q. You were at one time receiver of the Kona Sugar Co. were you not, Mr. Scott?

A. Yes sir.

Q. And as such you took possession of the assets and property of the Kona Sugar Co.?

A. Yes.

Q. State whether or not the Kona Sugar Co. had any interest in the land over which the Kona Sugar Co.'s railroad ran?

A. Yes, it had an interest in the land.

Q. In all of it?

A. In all of it, excepting one holder, a right there was, as I understand since, a permissive right. At the time I thought it was a written right. *At the time I thought it was a written right; since that time I have understood it is only a permissive.*

Q. The right of a licensee?

A. Yes, yes.

Q. Whose land was it?

A. J. D. Paris'.

Q. How much of a railroad ran on the land of the Kona Sugar Co.?

A. Well, there is a total length of about seven miles and a half including the line of track laid, of which about a little more than six miles was made of the rails of Mr. Bierce. The portion of the rails and portion of the railroad on the Paris land was made wholly of other material, and the distance on Mr. Paris' land is about a little more than a mile, and over that there was only a permissive right.

Q. Now will you please answer my question. You didn't quite understand it. How much of the land belonging to the Kona Sugar Co. did this railroad run over?

1138 A. Well, you mean the land in fee or land in which they had a right, a lease?

Q. Let's take the fee first. We will divide them. How much of fee simple land owned by the Kona Sugar Co. did this railroad run over?

A. Well, there are two tracks which they own a right in fee, and another undivided tract in which they had an undivided interest. The two tracts would aggregate about a third of a mile. The undivided land in which they had an undivided interest would be about a little less than two-thirds of a mile; that was on fee simple land, though.

Q. Now what other interest did the Kona Sugar Co. have in land over which this railroad ran?

A. Leasehold interest.

Q. Whose leasehold; who was the lessor?

A. Well, beginning at the mill the first lessor was the Kapiolani Estate.

Q. How much of the track ran over that piece of land?

A. They have two tracts, two tracts of land. The first one the mill stands on and the track starts from the boundary, that is, it runs across the entire width of it, and also includes all the side tracks surrounding the mill, and that tract there is—I can only give you these distances approximately—I suppose it is about 400 feet across the tract. Then there is a switch running the entire distance across it, and then there is a spur track of about 500 feet.

Q. 500?

A. 500 feet. Then that is not the extreme north end of the road; there is a little—another tract still north of that, over which they obtained a right of way from Kunuiakea.

Q. Have you given me all of the track on the Kapiolani Estate land?

1139 A. On the first tract I have.

Q. That is about 1300 feet?

A. I better begin at the end of the road and proceed along; it will be a more intelligent way of giving this evidence. Track began there first, the extreme north end of the road begins on land owned

by the Catholic Mission, sub-let to a native, or leased to a native; the native sub-leased to two Japanese and the Japanese granted a right of way to the Kona Sugar Co. over the land.

Q. In writing?

A. In writing.

Q. When was that grant made?

A. That grant was made in September, 1901, in August, September, October, along there sometime.

Q. Before or after the rail was laid?

A. Before the rail was laid, but not before the rail was commenced. The railroad, the construction of the railroad was blocked for several months in order to get the right of way, and they—they have had to pay \$500 to secure that right of way.

Q. In 1901?

A. Yes.

Q. How much of the road ran on that right of way; how long was their piece on that right of way?

A. Between four and five hundred feet of track.

Q. How long was the right of way, or license, how long did it extend?

A. During the residue of their right.

Q. During the residue of whose right?

A. These Japanese's right, which I believe is six or seven years.

Q. Now what is the next piece?

1140 A. The next piece is the Kapiolani Tract which I have just stated.

Q. Yes.

A. The next.

Q. That is 1300 feet?

A. Including all the spurs and side-tracks.

Q. How long was that leased for?

A. I think about thirty years.

Q. Thirty years?

A. I think there is an extension of the lease clause in the lease that extends it approximately thirty years.

Q. Now what is the next piece?

A. The next is Wilberoth, Henry Wilberoth's land, and the distance across that is perhaps 600 feet.

Q. 600 feet?

A. Might be a little less, 500 feet.

Q. How did they get the right to pass over that land?

A. By a written right.

Q. Right of way?

A. Yes.

Q. When was that obtained?

A. In 1901.

Q. Before or after the road was made?

A. Before.

Q. Before the road. How long does that right, that license, extend?

A. 30 or 50 years, I have forgotten which.

- Q. What is the next piece of land?
A. The next piece of land *if* Sophia Coburn, Sophie—Mrs. Sophie Coburn.
- 1141 Q. How long is the track over that land?
A. That is four or five hundred feet.
Q. And how do they have the right there?
A. By a written lease.
Q. Lease or right of way, license?
A. License, right of way.
Q. Right of way?
A. Yes.
Q. How long is that for?
A. I am not sure whether it is 30 or 50 years. It is a long time.
Q. I see, and was that obtained before or after the railroad was constructed?
A. Before.
Q. What is the next piece?
A. The next piece is the—is a Kapiolani Tract. Now wait until I see. Yes, Kapiolani Tract.
Q. How long is the track over that land?
A. 300 feet perhaps.
Q. How does that right obtain; what is it, a license or leasehold?
A. It is a leasehold.
Q. How long is the lease?
A. It has an extension clause for 30 years.
Q. What is the next piece?
A. The next piece is—I forget the name of the piece. It is one of the pieces that the Kona Sugar Co. had in fee.
Q. One that they had in fee?
A. Yes.
Q. Undivided interest?
A. No, in fee, in full possession.
- 1142 Q. Third of a mile run over that?
A. Approximately.
Q. Now what was the next piece?
A. Puapuanui, belonging to the Greenwell estate.
Q. How much track ran over that?
A. Six or seven hundred feet—No, it is more than that. It is perhaps seven or eight hundred feet.
Q. How did they have a right to go over that land?
A. By a right of way or lease of the right of way.
Q. Is this a lease or right of way, a license or right of way—or lease?
A. It is a right of way. They have the—they have a lease of a portion of the tract.
Q. Puapuaiki, don't they lease that?
A. Part of Puapuanui, but I believe that that land which they have leased does not extend quite down to the railroad; I think it only extends to the road and the railroad just near the boundary of that land crosses the road and runs below the road, and it is a right of way.
Q. How long does that right of way, that license, extend?

- A. I think it is fifty years. Most of these rights of way were fifty.
- Q. Was this obtained before or after the construction of the road?
- A. Before.
- Q. What is the next piece of land?
- A. The next piece of land is Holualoa 1 and 2, in which the company owned an undivided interest.
- Q. How long is the road over that land?
- A. Well, within that land there are two other grants;
- 1143 within these lands were two other grants, and the trackage on the Holualoa 1 and 2 proper I think is between a half and two thirds of a mile.
- Q. How long is the track over those two grants that are within Holualoa?
- A. Over the first one which is known as—the name has slipped me—it is perhaps between three and four hundred feet across it.
- Q. What is the interest of the Kona Sugar Co. in that?
- A. They have a right of way across it.
- Q. A written right of way?
- A. A written right of way.
- Q. Was it obtained before or after the construction of the road?
- A. Before the construction of the road.
- Q. Now that piece within there, how long is the road over that?
- A. That is between four and five hundred feet.
- Q. And how do they have an interest there?
- A. A right of way across it.
- Q. A written right of way?
- A. Yes.
- Q. How long does it extend for?
- A. Fifty years, I think.
- Q. Was it made before or after the construction?
- A. It was obtained before.
- Q. What is the next piece of property?
- A. The next is known as Holualoa 3.
- Q. And what is the distance across that?
- A. The distance across that is between five and six hundred. I should say it is five or six hundred feet.
- 1144 Q. And how do they have an interest in that land?
- A. A right of way across it.
- Q. In writing.
- A. Yes.
- Q. Obtained before or after the construction of the road?
- A. Before.
- Q. What is the next piece?
- A. The next piece is Holualoa 4, which the Kona Sugar Co. own in fee.
- Q. What is the distance across that?
- A. Distance across that is perhaps between 800 and a thousand feet.
- Q. What is the next right of way?
- A. The next is Pahoe-hoe, of which there are 1, 2, 3, and 4.
- Q. What is the distance across that land?

A. The distance across the four lands is something like between six and eight hundred feet.

Q. What is the interest of the Kona Sugar Co. in that land?

A. One of them was a leasehold interest; the other are rights of way, that is—

Q. And obtained before the construction of the road?

A. Obtained before the construction of the road.

Q. And when does the lease expire?

A. I am not sure what is the length of the lease; it was a pretty long lease, though.

Q. What is the next land?

A. The next lands were the lands formerly of the Hawaiian Coffee & Tea Co. afterwards the Kailua Coffee Co. and at this time belonging to Vasconcello and M. V. Sousa, under mortgage 1145 to the Lunalilo estate of which W. O. Smith was trustee and his associates. Their right of way is, or their license there is a right of way across that for fifty years, in which the owners of the land at that time joined, and also the mortgagors—mortgagees—joined in the right of way across.

Q. Was that obtained before or after the construction?

A. Obtained before.

Q. What is the next item?

A. Wait a minute please. There are so many of these lands perhaps I may get them a little confused. Between Pahoehoe's and this land that I have last described was Kamalomalo, of which the Greenwell Estate were the owners in fee, and there were some tenants and the right of way was signed by all of the parties, the owners of the fee and the tenants.

Q. Before the construction of the road?

A. Before the construction of the road.

Q. And what is the distance across these lands?

A. Well, up to a thousand feet, I should think.

Q. Any other lands?

A. Well, the next, the land I have described, is this Hawaiian Coffee and Tea lands. Then comes—there are also along within these lands a few kuleanas that are crossed for which rights of way were obtained, that I may have omitted. The next land after these is Keauhou 1 and 2.

Q. What is the distance across those?

A. The distance across that is between a mile and a half and two miles.

Q. What is the interest of the Kona Sugar Co. in that land?

A. A right of way across it.

1146 Q. In writing?

A. Yes.

Q. Obtained before or after the construction of the road?

A. Obtained before.

Q. What other lands are there?

A. The next land, I am not sure whether it is Honalo or not; I think it is. The land is owned, I think, by Isaac Sherwood in fee. There are some tenants on the land from whom a right of way were obtained. I wouldn't be sure whether the owner, Sherwood, joined

in the granting of the right or not. I couldn't say for sure, positive, about that.

Q. What is the distance across?

A. Four or five hundred feet.

Q. What is the next?

A. Well, I think that at that point the Paris and the Paris interests' lands begin,—that is the Paris land, Mrs. Roy's land, Mrs. Robertson's land, and Shipman's, I think, further on to the end of the track.

Q. Now is that the land which is farthest from the mill?

A. Yes.

Q. The Paris land and the Paris interests?

A. Yes.

Q. Where did you get your knowledge of these right of ways coming from—obtained?

A. From the written instruments in my possession at that time.

Q. They were in your possession?

A. Yes.

“Cross-examination of M. F. SCOTT.

Mr. CATHCART:

1147 Q. At what distance from the mill does the Paris land commence,—that is the Roy land, the lands represented by the Paris interests?

A. Well, it is more than six miles, it is more than six miles to the mill.

Q. Are any of those—of the rails that are laid on this Paris interest lands rails that were sold by Bierce to the Kona Sugar Co.?

A. No.

Q. They are different rails entirely?

A. Different rails entirely.

Mr. McCLANAHAN: We now ask the Court, and with the consent of counsel, that the papers introduced in the McChesney suit be taken as read in evidence without going through them.”

1148 Whereupon counsel for the defendants asked the witness Scott the following question:

“Q. I will ask you then whether Mr. Wm. Bierce was present when you gave that testimony?”

“Mr. PROUTY: I object to that testimony as entirely immaterial.”

Which objection was by the Court sustained, to which ruling of the Court said defendants then and *they* duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 52.

Transcript of Ev., pp. 193-240.

Thereafter, and upon the re-direct examination of the said witness M. F. Scott by counsel for defendants, the following question was asked:

"Q. And at that time" (at the time of the construction of the railroad on the property of the Kona Sugar Co. Ltd. at Kona, Hawaii) "and while you were Receiver there" (of said Kona Sugar Co. Ltd.) "I will ask you if you were acting under the direction of the advisory committee that you have named?"

Whereupon the following proceedings were had:

"Mr. PROUTY: I object to it as incompetent to show the authority of the receiver in that way."

"Mr. CATHCART: I am going to follow it up, if the Court please. I will follow this up, show how the advisory committee came to have control of the Receiver there by order of the Court, and also how the order of the Court was competent."

"Mr. PROUTY: I also object. It relates to a period long prior not only to the judgment but even to the bringing of the replevin suit, and it is incompetent."

Whereupon the Court sustained said objection, to which ruling of the Court said defendants then and there duly excepted, and now assign the same as error.

1149

Exception No. 53

Transcript of Ev., pp. 194-243.

Thereafter, and on recross examination of the said witness M. F. Scott by counsel for plaintiff, the following proceedings were had:

"Q. Mr. Scott, you said this morning that Mr. Linder had no authority from Mr. Hutchins to use this railroad property. How do you know that?"

"A. From a conversation with Mr. Linder—with Mr. Hutchins."

"— That is, your statement to that effect this morning was based on something that was told you by Mr. Hutchins?"

"A. Mr. Hutchins and I discussed that."

"Q. Well, who was present at that conversation?"

"A. On one occasion Mr. Cathcart was present."

"Q. Nobody else?"

"A. No one else, no one else that I can recall."

Whereupon counsel for plaintiff moved to strike out the testimony theretofore given by the witness Scott to the effect that Linder had no authority from Hutchins, on the ground that it now appeared to be hearsay, and was therefore not admissible.

Said motion to strike was granted by the Court, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 54.

Transcript of Ev., pp. 265-266.

Thereafter defendants offered to prove by the witness John W. Cathcart, that at certain interviews between the witness Cathcart and the witness M. F. Scott and Clinton J. Hutchins, prior to the

21st day of May, 1904, Mr. Clinton J. Hutchins, Trustee, and
1150 his counsel, Mr. John W. Cathcart, directed the said Scott
to use all his efforts to re-deliver the property involved in the
replevin suit heretofore referred to, to Wm. W. Bierce, Ltd., and to
assist Wm. W. Bierce, Ltd. in all ways to get the property, and in
case any action was taken by Wm. W. Bierce Ltd. on the premises
of the Kona Sugar Company, Ltd., at Kona, Hawaii, to offer to
deliver and to offer to assist in delivering said property.

Whereupon plaintiff objected to said facts being shown in evi-
dence, which objection was sustained by the Court, to which ruling
of the Court defendants then and there duly excepted, and said
ruling is here and now assigned as error by said defendants.

Exception No. 55.

Transcript of Ev., p. 266.

Immediately thereafter the following proceedings were had:

"Mr. ROBERTSON: We now move to strike out the testimony just
given by Mr. Cathcart, since he was recalled here, on the ground
that it is irrelevant and immaterial and has no possible bearing on
any issue in this case." (The testimony referred to being statements
made by the witness Cathcart that he was present at conversations
between Scott and Hutchins prior to the 23rd day of May, 1904,
when the subject of re-delivery of the railroad material was dis-
cussed.)

The Court granted said motion to strike out said testimony, to
which ruling of the Court defendants then and there duly excepted,
and said ruling is here and now assigned as error by said defendants.

Exception No. 56.

Transcript of Ev., p. 270.

Thereafter, said defendants having rested their case, plaintiff
offered in evidence a certain letter dated May 21st, 1904, addressed to
J. K. Nahale, purporting to be signed by J. D. Paris, said
1151 letter being subsequently marked "Exhibit MM" in this case,
said letter being in words and figures as follows, to wit:

1152

KEALAKEKUA, May 21, 1904.

J. K. Nahale, Esq., Dep. Sheriff, North Kona.

SIR: You are hereby notified that the Kona Sugar Co. its succes-
sors or assigns, do not own, or lease, any right of way for a Rail
Road, across or over the lands of Maihi 1, Maihi 2nd, Kuamoo,
Kawainui 1, Kawainui 2, & Lehuula nui, which lands are owned
by us.

You are hereby forbidden & all persons under you from trespass-

ing or removing any property from these lands without [our]* special permission from the undersigned.

J. D. PARIS,
Mrs. E. ROY,
J. D. JOHNSON,
W. H. JOHNSON,
W. H. SHIPMAN,

By Their Attorney in Fact, J. D. PARIS,

Endorsed: Law 6023. Plaintiff- Exhibit M. M. Law No. 6023. Plaintiff's Exhibit M. M. Filed May 19th, 1908. Job Batchelor, Clerk.

1153 Defendants objected to the introduction in evidence of said letter, as incompetent, irrelevant and immaterial, which objection was by the Court overruled, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 57.

Transcript of Ev., pp. 271-272.

Thereafter, and on cross examination of one John D. Paris, a witness called in rebuttal on behalf of plaintiff, the following question was asked said witness by counsel for defendants:

"Q. What was the object of giving this notice" (referring to said letter, Exhibit M M), to which the witness answered:

"A. I had understood there was going to be a levy on the property of the Kona Sugar Company, and as the Kona Sugar Company had no rights on these lands and were owing large amounts in arrears on rents, and so on, I objected to anybody taking anything off these lands without our knowledge or permission."

Whereupon counsel for defendants asked said witness the following question:

"Q. It was not, then, because the rails there were rails that were claimed by Bierce & Co., it was because they were about to levy on the property belonging to the Kona Sugar Company, is that right?"

Which question was objected to by plaintiff as incompetent, irrelevant and immaterial, and as assuming a fact not in evidence. Said objection was sustained by the Court, to which ruling of the Court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 58.

Transcript of Ev., p. 272.

1154 Immediately thereafter, upon the cross examination of said witness John D. Paris, counsel for defendants asked the said witness the following question:

[* Word enclosed in brackets erased in copy.]

"Q. Did you at that time think that the rails that were on your land were rails that the Bierce Company had any claim or title to?"

Said question was objected to by plaintiff, and said objection sustained, to which ruling of the Court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 59.

Transcript of Ev., pp. 272-273.

Immediately thereafter, and on cross examination of said witness John D. Paris, counsel for defendants asked said witness the following question:

"Q. Was any request ever made for permission to remove the rails by Mr. Nahale?"

"Mr. PROUTY: I object to that question, if Your Honor please."

"The COURT: The objection is sustained."

To which ruling of the Court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 60.

Transcript of Ev., p. 274.

Immediately thereafter the said witness John D. Paris was asked on cross examination by counsel for defendants the following question:

"Q. Did you at any time ever make the claim that those rails on your land were the so-called Bierce rails?"

To which question plaintiff objected, on the ground that the same is immaterial, and not binding on plaintiff.

1155 Said objection was by the Court sustained, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 61.

Transcript of Ev., p. 281.

Thereafter, one H. E. Cooper was called as a witness on behalf of plaintiff in rebuttal, and testified that in May, 1904, acting as one of the attorneys for Wm. W. Bierce, Ltd., he went to the property of the Kona Sugar Company, Ltd., at Kona, Hawaii, and entered the premises owned by the Kapiolani Estate, Ltd., (upon which the mill and a portion of the railroad, locomotives and cars of the Kona Sugar Co. Ltd. is situated), whereupon the following proceedings were had, on direct examination:

"Q. When you arrived at the Kapiolani Estate premises stat- whether or not any one was in possession of those premises?"

"A. There were several men there, yes."

"Q. Do you recollect who any of them were?"

"A. I remember that one of the Colburn boys was there."

"Q. Yes?"

"A. Appeared to be in charge of the place."

Defendants moved that the answer that one of the Colburn boys appeared to be in charge of the place be stricken out, as being the conclusion of the witness. The Court denied said motion to strike, to which ruling of the Court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 62.

Transcript of Ev., pp. 282-283.

Thereafter, and on direct examination, the witness H. E. Cooper testified that he made a demand on said Colburn for the possession of certain railroad material on the premises of the Kapiolani Estate, whereupon the Court asked said witness the following question:

"Q. Well, give us your best recollection as to what he" (Colburn) "said when you demanded possession of the property?"

"A. I couldn't remember the conversation, Judge, as to his method of speech, or what he said, or what I said; I simply made a demand on him, I asked him, I think, if he was in charge of the place. He said he was. I asked him whom he represented. He said he represented the Kapiolani Estate. I remember that part of it. I can't remember what was said in the way of his refusal, I remember that we talked it over. The result of the conversation was that he wouldn't deliver the property. I couldn't do it better than that."

"Mr. CATHCART: We move to strike out what the result of the conversation was. It is not for the witness to tell us whether there was a refusal or not, it is for the jury to tell from all the evidence in the case."

Whereupon the Court refused to grant the motion to strike out, to which ruling of the Court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

1157

Exception No. LXIII.

Transcript of Ev., p. 286.

Thereafter, and upon the further direct examination of the said witness, H. E. Cooper, the following question was asked said witness by counsel for plaintiff:

"Q. As a matter of fact, did you get possession of any of that property (the railroad property referred to in the said case of William W. Bierce, Limited, v. Clinton J. Hutchins, Trustee) either that which was on the Kapiolani Estate lands or on other lands?"

Said question was objected to by defendants as incompetent, irrelevant and immaterial, and as calling for the conclusion of the witness, said objection was overruled by the court, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as errors by said defendants.

Exception No. LXIV.

Transcript of Ev., p. 298.

Thereafter, and on cross examination of the said witness, H. E. Cooper, the following question was asked said witness by counsel for defendants:

"Q. As a matter of fact, your relations with the Kapiolani Estate was amicable then (referring to the time witness testified he attempted to take possession of said railroad property), were they not?"

To which question the witness answered:

"A. I think there had been some treaty with the Kapiolani Estate about taking this property; negotiations for a sale to the Kapiolani Estate."

Plaintiff moved to strike out said answer on the ground that it was incompetent, irrelevant and immaterial, and a mere conclusion of the witness, not proper cross examination and not responsive.

Whereupon the court struck out said answer of the witness, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

1158

Exception No. LXV.

Transcript of Ev., p. 318.

Thereafter, and on further cross examination of the said witness, H. E. Cooper, by counsel for defendants the following question was asked:

"Q. Isn't it a fact that the Kapiolani Estate had executed at that time (referring to the time witness testified he had gone to Kona for the purpose of taking possession of the railroad property) a written document? (referring to an instrument dated April 14th A. D. 1904, purporting to be a release from the Kapiolani Estate, Ltd., by its President and Treasurer to William W. Bierce, Ltd., of the property described in said action of William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee)."

Said question was objected to by plaintiff as irrelevant and immaterial and not proper cross examination, which said objection was by the court sustained, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. LXVI.

Transcript of Ev., p. 325.

Thereafter, and in rebuttal plaintiff offered in evidence a certified copy of deed from C. J. Hutchins, Trustee, to the Henry Waterhouse Trust Company, Limited, dated June 13th 1903, being Exhibit "NN" in this case, which said deed is in words and figures as follows, to-wit:

1159 Stamped \$28.00

This Indenture made this 13th day of June, A. D. 1903, by and between Clinton J. Hutchins, Trustee, of Honolulu, Island of Oahu, Territory of Hawaii, party of the first part, and Henry Waterhouse Trust Company, Limited, an Hawaiian corporation, party of the second part, Witnesseth: Whereas the said Clinton J. Hutchins, Trustee, is the grantee in that certain deed dated June 13th, 1903, made by F. L. Dortch, Receiver of the Kona Sugar Company, Limited, of certain plantation property in Kona, Island and Territory of Hawaii, in said deed mentioned and referred to, and Whereas it is the desire of the said party of the first part and others interested in said property and represented by him, to secure the said party of the second part for money loaned and advances to be made, not to exceed the sum of Twelve Thousand Two Hundred & Fifty Dollars (\$12,250.00) by the said party of the second part to the said party of the first part, in case the said party of the first part, his successors or assigns, deems it advisable. Now Therefore, This Indenture Witnesseth: That said party of the first part in consideration of the sum of Ten Dollars (\$10.) to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the sum of Twelve Thousand, Two Hundred and Fifty Dollars (\$12,250.) advanced and to be advanced as aforesaid, does hereby grant, bargain sell and convey unto said party of the second part all the right, title and interest of the said party of the first

G. L. B. part in and to all and singular those certain goods, chattels, effects and property, real, personal and mixed, conveyed to said party of the first part by deed of F. L. Dortch, Receiver of the Kona Sugar Company, Limited, dated June 13th, 1903, i. e. all of the lands, tenements and hereditaments, all interest in lands, leases and leaseholds, easements, railroad, railroad equipment, locomotives, flat cars, cane cars, sugar mill and equipment, cane conveyors, buildings, tools, implements, wagons, vehicles, growing crops, live stock, choses in action franchises, and all rights and privileges of said company conveyed to said party of the first part, and the goodwill of the same; conveying hereby all and every right, title and interest which the said party of the first part may have in and to said property and effects, whether the same be mentioned hereinbefore or not; and constituting and being the same property conveyed to the said party of the first part by Deed of F. L. Dortch, Receiver of the Kona Sugar Company,

Limited, dated June 13th, 1903, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold all of said property unto the said Henry Waterhouse Trust Company, Limited, and its successors and assigns forever upon the Trusts and subject to the powers provisos, agreements and declarations hereinafter expressed or set forth. It is hereby

G. L. B. declared, covenanted and agreed between the said parties hereto that the said party of the second part shall have full power and authority to manage and control the property hereby conveyed so far as may be necessary to conserve and preserve the same, to harvest the sugar cane that may be growing or situated thereon, and to convert the same into sugar; to sell and dispose of said sugar; to receive and collect all moneys that may be obtained from any source of income or profit from said plantation, and give all necessary and proper vouchers and acquittances therefor; to expend such sums as may be necessary to pay for the ordinary expenses of harvesting the crop of Sugar cane now on said plantation; but that no funds shall be expended for permanent improvements outside of

1161 what may be actually necessary or convenient to harvest said crops, without the consent of the said party of the first part or his successors or assigns. It is hereby further covenanted, agreed and declared between the parties hereto that all funds which shall come into the hands of the said party of the second part from the sales of sugar or otherwise shall be disposed of as follows: 1. To the payment of the principal amount of all advances made by the said party of the second part and interest on the same at the rate of Eight (8) per cent per annum on daily overdraft balances. 2. To the payment of a commission of Two and one-half ($2\frac{1}{2}$) per cent to the said party of the second part, on all sales of sugar for said plantation, as full compensation as managing agent of

G. L. B. said plantation, and the further sum of Fifteen Hundred Dollars (\$1500.) as full compensation as Trustee under this Deed of Trust. 3. To the payment of the expenses of harvesting the matured crop of sugar cane now on said property; and of conserving and preserving said property. 4. To the payment of taxes on said property, and such rents as the party of the first part, or his successors or assigns may be liable for. 5. The balance to be paid to the party of the first part or his successors and assigns. Provided however, and these presents are made upon the express condition that all advances to the amount of Twelve Thousand Two Hundred and Fifty Dollars (\$12,250.) made by the said party of the second part for the purposes herein mentioned shall constitute a lien upon and be secured by these presents. And that all advances so made by the said party of the second part shall be immediately due and payable, and of the moneys coming into the hands of the said party of the second part from the sales of sugar or otherwise shall be insufficient to satisfy said advances within six months after the same have been made, provided, if the harvesting of the sugar cane

1162 now on said property shall be then completed, otherwise upon the completion of such harvesting, and said advances shall not

have been paid to said party of the second part, or in the event that legal or equitable proceedings be instituted at a time that said party of the second part shall not have been reimbursed for advances by it made, which said legal or equitable proceedings shall

G. L. B. render the further operation and maintenance of said plantation impracticable, then it shall be lawful for and the said party of the second part, and it and its successors and assigns are hereby authorized as the attorney or attorneys with power irrevocable of the said party of the first part, to foreclose this Trust Deed by bill in equity or otherwise, or to enter upon and take possession of said premises or with or without entry to sell the same at public auction in Honolulu with all improvements that may be thereon, first publishing a notice of the time and times and place and places of such sale or sales according to law, and convey the said premises so sold by proper conveyances to the purchaser or purchasers thereof, and such sale or sales shall forever bar the said party of the first part, and all persons claiming under him, from all right and interest in said premises whether at law or in equity. And out of the money arising from such sale or sales the party of the second part or its successors and assigns shall be entitled to retain all sums then secured by this deed whether then or thereafter payable, including all costs, charges and expenses incurred or sustained by them by reason of any default in the performance or observance of the covenants and conditions of this Deed of Trust, and an attorney's fee, and also all advances and expenditures made necessary by any default of the party of the first part in the performance or observance of said covenants and conditions, and in order to protect said security and save said property from loss or injury, rendering the surplus, if
1163 any to the said party of the first part or his successors or assigns, or any person or persons in its or their behalf may purchase at any sale made aforesaid, and that no other purchaser shall be answerable for the application of the purchase

G. L. B. money. Subject to the terms, conditions, covenants and stipulations herein contained, this Indenture shall remain in full force and effect for the period of one year, or until said party of second part shall be repaid for all advances made by it under the terms of this Indenture, unless sooner terminated by agreement of the parties hereto or their successors or assigns or by foreclosure or sale by the said party of the second part pursuant to the terms hereof. In witness whereof, the said parties hereto have caused these presents to be duly executed the day and year first above written.

CLINTON J. HUTCHINS, *Trustee*,
HENRY WATERHOUSE TRUST
COMPANY, LTD.,

By ARTHUR B. WOOD,
Its Vice-President.

By RICHARD H. TRENT,
Its Treasurer.

TERRITORY OF HAWAII,
Island of Oahu, ss:

On this 15th day of July, A. D. 1903, personally appeared before me Clinton J. Hutchins, Trustee, known to me to be the person described in and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein set forth.

GEO. L. BIGELOW, [.]
Notary Public, First Jud. Circuit.

TERRITORY OF HAWAII,
Island of Oahu, ss:

On this 20th day of July, A. D. 1903, personally appeared before me Arthur B. Wood, and Richard H. Trent, Vice Pres't and 1164 Treasurer, respectively, of Henry Waterhouse Trust Co., Ltd., known to me to be the persons described in and who executed the foregoing instrument and who severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth, and the said Arthur B. Wood and Richard H. Trent further acknowledged to me that they executed the same as the free act and deed of said corporation.

G. L. B. GEO. L. BIGELOW, [.]
Notary Public, First Jud. Circuit.

Recorded & Comp. this 27th day of July A. D. 1903 at 3:56 o'clock P. M.

THOS. G. THRUM,
Registrar of Conveyances.

Office of the Registrar of Conveyances.

HONOLULU, T. H., May 5th, 1908.

The foregoing is a true copy of record recorded in the Office of the Registrar of Conveyances of the Territory of Hawaii in Book 251, Pages 42-46.

Attest:

(Sig.) CHAS. H. MERRIAM, [SEAL.]
Registrar of Conveyances for the Territory of Hawaii.

Endorsed: Law 6023. Certified Copy Tr. Deed. C. J. Hutchins Tr. To Henry Waterhouse Trust Co. Ltd. Dated June 13th, 1903. Recorded Book 251, Pages 42-46. Plaintiff's Exhibit N. N. Registry of Conveyances for the Territory of Hawaii at Honolulu. Plaintiff's Exhibit N. N. Law No. 6023. Plaintiff's Exhibit N. N. Filed May 19th, 1908. Job Batchelor, Clerk.

1165 Defendants objected to the introduction of the said deed in evidence as being incompetent, irrelevant and immaterial, not in any way rebuttal and not material to the issues in the case,

which objection was by the court overruled, to which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. LXVII.

Transcript of Ev., p. 332.

Thereafter, the witness, H. E. Cooper, having voluntarily resumed the stand for the purpose of making explanation was asked by counsel for defendants the following question:

"Q. Now isn't it a fact, Judge, that when you went up there that time to get the property that you were not after the property; the idea was not to secure the property for the Bierce people, and isn't it a fact that the Bierce Company at that time did not want the property?"

To which question the witness answered:

"A. No, that is not the condition, Mr. Cathcart. I went up there for the purpose of making a genuine effort to get that property, that is to say, if I could do so without any interference by any one; I thought we must necessarily do that, but there had been a change in policy with our clients."

Whereupon counsel for defendants asked the said witness the following question:

"Q. What was that?"

To which last question plaintiff objected upon the ground that it was calling for confidential disclosures between counsel and client privileged under law, and on the further ground that it was not proper redirect examination.

Whereupon the court sustained said objection, to which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

1166

Exception No. LXVIII.

Transcript of Ev., 333-334.

Immediately thereafter counsel for defendants asked said witness, H. E. Cooper, the following question:

"Q. But the idea was that if there was the slightest pretext for refusing to taking it (the railroad property) you were to take advantage of that pretext; was that not the case; is that not so?"

Thereafter counsel for defendants asked the said witness, Cooper, the following question:

"Q. I suppose that calls for your purpose down there—Judge Cooper, what was your purpose? And does not call, as I understand it, for any disclosure of any communication between yourself and client?"

To which the witness answered:

"A. The reason I went myself instead of sending the execution to the Sheriff was that I considered that we were laying the founda-

tion for complying with the change of policy dictated by our clients."

Thereupon counsel for plaintiff moved to strike out the testimony of the witness with reference to policy, or any other matters which he had stated were dictated by his client, William W. Bierce, Limited, as stating a privileged communication between attorney and client, and also as stating a conclusion, which motion was granted by the court, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. LXIX.

Transcript of Ev., pp. 337-338.

Thereafter, and on further cross-examination of the witness, H. E. Cooper, by counsel for defendants, the following question was asked said witness:

"Q. Is it not a fact, Mr. Cooper, that the plaintiff in this action William W. Bierce, Limited, while they thought they could sell that property, were desirous of getting it (referring to the railroad property), and after they found they couldn't make a sale of the property that they didn't want the property, but they wanted to proceed against the bond, isn't that so?"

1167 Plaintiff objected to said question as calling for confidential communications between the witness and his client whereupon the witness said:

"In my opinion, I could not answer the question in its entirety without disclosing the relations that existed prior to my going on my first trip to Kona, and at the time that I went at this time, because we were acting under instructions pure and simple from our clients."

Whereupon the court sustained said objection, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. LXX.

Transcript of Ev., pp. 339-340.

Whereupon counsel for defendants made the following offer of testimony:

"Mr. CATHCART: We offer by this witness (Henry E. Cooper), if the court please, to show that the plaintiff, William W. Bierce, Limited, was endeavoring to sell this property, the property in question; that when the negotiations were at first commenced, looking to the sale of this property to the various parties to whom options were given, the plaintiff desired possession of the property, and in their negotiations treated the property as within their possession; that W. W. Bierce, the President or some officer of the plaintiff corporation negotiated some of these options himself; that

subsequent thereto, the plaintiff changed its attitude in reference to the matter, not being able to put through these sales which they were negotiating, and that then their endeavor was to avoid taking the property so as to pursue the remedy on the bond for the money value of the judgment obtained; and that that policy as I have outlined guided the plaintiff from the time of securing of the judgment in the replevin suit up to and including the period when the witness (Henry E. Cooper), as their attorney, went to Kona on that trip he has stated in his testimony; and we also offer to show by this witness that after the return of W. W. Bierce to the mainland, and either in the latter part of March or in April of 1904, that the attorneys for the plaintiff here were instructed by the plaintiff not to take the property, but to proceed against the bond on the judgment valued—on the judgment for the money claimed. That is our offer, if the court please."

Said offer of testimony was objected to by plaintiff as incompetent, irrelevant and immaterial, which said objection was sustained by the court, to which ruling of the court said defendants 1168 then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. LXXI.

Transcript of Ev., pp. 348-349.

Thereafter on further cross examination of the said witness, Henry E. Cooper, and the said witness having produced a letter book containing a copy of a letter dated, April 14th (19th?) purporting to be a release from the Kapiolani Estate, Limited, by its President and Treasurer to William W. Bierce, Limited, of the property described in the complaint in the action of William W. Bierce, Limited, against Clinton J. Hutchins, Trustee, counsel for defendants offered said letter in evidence, which offer was objected to by plaintiff upon the ground that there was no evidence that the letter was ever sent, and in the second place, if it was sent, it was a confidential communication between attorney and client, and in the third place, that the witness' knowledge and recollection of the alleged release had already been fully covered in the evidence, which objection was by the court sustained, to which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. LXXII.

Transcript of Ev., pp. 359-360.

Thereafter on surrebuttal defendants offered to show that on or about the 14th day of April—between that time and the 19th day of April, 1904, the original instrument of which the document produced by defendants was a carbon copy, and being the same instrument defendants had theretofore requested the plaintiff in

this action to produce, was executed by the Kapiolani Estate, Limited, by its President and its Treasurer, and that it was then delivered to the attorneys in fact of the plaintiff, Kinney, McClanahan & Cooper, and that the witness then on the stand called in 1169 surrebuttal, one John F. Colburn, Treasurer of the Kapiolani Estate, Limited, had not seen said document since said time, and that when he last knew of it, it was in the hands of the attorneys for William W. Bierce, Limited, said document purporting to be the release heretofore referred to in this Bill of Exceptions.

Said offer was objected to by plaintiff as incompetent, irrelevant and immaterial, and not proper surrebuttal, which objection was sustained by the court, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. LXXIII.

Transcript of Ev., p. 360.

Immediately thereafter counsel for defendants asked the said witness, John F. Colburn, the following question:

"Q. Did the Kapiolani Estate, Limited, at any time between the 14th day of April, 1904, and the 23rd day of May, 1904, surrender or release its rights to this railroad material, if any, to W. W. Bierce, Limited?"

Which question was objected to by plaintiff as incompetent, irrelevant and immaterial and not surrebuttal, which objection was by the court sustained, to which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. LXXIV.

Transcript of Ev., p. 372.

Thereafter, defendants called in surrebuttal one R. W. Shingle, who testified that he was an officer of the Waterhouse Trust Company, Limited, and that a certain trust deed, being plaintiff's Exhibit "NN," in this case, given to the Henry Waterhouse Trust Company, Limited, terminated either in the latter part of January or the fore part of January, 1904, whereupon said witness 1170 was asked by counsel for defendants the following question:

"Q. Did you ever make any claim to this property (Referring to the said railroad property, which was included in the said trust deed) after that time (January or February 1904) against the W. W. Bierce Company, Limited?"

Which question was objected to by plaintiff as irrelevant, and immaterial and not proper surrebuttal, which objection was sustained by the court, to which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. LXXV.

Transcript of Ev., p. 372.

defendant-

Immediately thereafter counsel for [plaintiff]* asked said witness, Robert W. Shingle, the following question:

"Q. Or make any claim to the property after that time as against C. J. Hutchins, Trustee?"

To which question plaintiff objected on the ground that the same is irrelevant and immaterial and not proper surrebuttal, which objection was by the court sustained, to which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. LXXVI.

Transcript of Ev., p. 378.

Thereafter, and both plaintiff and defendants having rested the following proceedings were had:

"Mr. LEWIS (for defendants): At this time, in order to preserve our rights in the matter, I desire to make a formal motion for a directed verdict on the grounds stated in my motion for a non suit. I presume your Honor will not want me to set them out in full; your Honor knows the grounds of that motion.

"The COURT: If you refer to that that will be sufficient.

"Mr. LEWIS: And also on the further ground that the evidence shows the sureties were released by the acts of C. J. Hutchins, Trustee, and the plaintiff, its agents and attorneys in relation to the property for which the return or delivery bond was given."

1171 Said motion was denied by the court, to which ruling of the court defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

1172

Exception No. 77.

Thereafter said defendant- requested the Court, in writing, to instruct the jury as follows:

"I instruct you, gentlemen of the jury, to render a verdict in favor of the defendant."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

[* Word enclosed in brackets erased in copy.]

Exception No. 78.

Said defendant- further requested the Court, in writing, to instruct the jury as follows:

"The defendants in this action are sued as sureties upon a bond given for a re-delivery of the property sought to be replevined by the plaintiff in the replevin action of William W. Bierce, Limited, against Clinton J. Hutchins, Trustee. I instruct you that as such sureties they are entitled to stand upon the letter of their contract, and their undertaking is to be construed strictly in their favor and is not to be extended by implication or inference beyond the fair scope of its terms."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 79.

Said defendant- further requested the Court, in writing, to instruct the jury as follows:

"The contract imports entire good faith and confidence between the parties in respect to the whole transaction, and where the
1173 signature of a surety has been procured by the obligee through any fraudulent misrepresentation or concealment of material facts, the surety is not bound."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 80.

Said defendant- further requested the Court, in writing, to instruct the jury as follows:

"The recital in the affidavit in the replevin case that the property was of the value of \$15,000 and the incorporation of the same statement in the undertaking given on replevin by the plaintiff creates an estoppel, so far as the plaintiff is concerned, to allege that the property in suit was valued more than \$15,000, as against any one who had acted on the faith of that affidavit and recital; and as by Sec. 2112 of the Rev. Laws (L. 1884, c. 38, s. 12) and by the undertaking in suit, Henry Waterhouse, deceased; the defendants' testator, entered into the written undertaking to the effect that he was bound in double the value of the property, as stated in the affidavit of the plaintiff, no recovery could be had for the value of the property as against said Henry Waterhouse, deceased, as such surety, or these defendants, his executors, beyond the said sum of \$15,000."

The Court refused to give such requested instruction to the jury, to which refusal of the Court the defendants, in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

1174

Exception No. 81.

Said defendant- further requested the Court, in writing, to instruct the jury as follows:

"A contract of suretyship may be avoided by a surety if the circumstances are such that it can be fairly inferred that the surety reposed confidence in the obligee and the latter suffered the former to deal under a material delusion; and if you find in this case that Henry Waterhouse, deceased, the defendants' testator, reposed confidence in the affidavit and statement of the plaintiff that the value of said goods did not exceed the sum of \$15,000 and entered into the obligation relying upon said affidavit and statement, then I instruct you that your verdict must be for the defendants."

The Court refused to give such requested instruction to the jury, to which refusal of the Court the defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 82.

Said defendant- further requested the Court, in writing, to instruct the jury as follows:

"The statutes of Hawaii provide that before any action can be brought against the estate of one deceased, as in this case, the Estate of Henry Waterhouse, deceased, a claim must be presented duly authenticated and with the proper vouchers, to the executors within six months from the date of the first publication of the notice to creditors or within six months from the day they fall due, or they shall be forever barred, and the executors or administrators are not authorized to pay them, the statute expressly declaring that it shall not be lawful to allow any claim that is barred. It is necessary for you to find in this case that the claim in suit was so presented to the defendants as executors, with the proper vouchers and duly authenticated, or your verdict must be for the defendants."

1175

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 83.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

"The statutes of Hawaii also provide when suits on rejected claims can be commenced, and I instruct you that it is necessary for the plaintiff in this action to show that the claim in suit has been rejected by the executors and that the suit was brought within two months after written notice of the rejection. If the action in suit was brought before such rejection and notice, then the action is prematurely brought and your verdict must be for the defendants."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 84.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

"Executors have a reasonable time in which to approve or reject claims under the statute, and it is incumbent upon the plaintiff to show that a reasonable time had elapsed before the suit was brought, or else the action is prematurely brought and your verdict must be for the defendants. In considering this matter you are

entitled to take into consideration the date of the presentation 1176 of the claim sued upon, which is alleged in the complaint as September 30, 1904, the date of the bringing of the action October 11, 1904, the allegation that the claim has not been rejected or approved by the executors, the testimony of the defendant Albert Waterhouse, executor, that at the time of the bringing of the action the claim had not been rejected, but that he was consulting his co-executor William Waterhouse, who was then in Pasadena, in the State of California, before taking any action upon the claim, and if in your judgment a reasonable time had not elapsed when this action was brought, then your verdict should be for the defendants."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 85.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

"The plaintiff being so bound to act in good faith towards the surety, as described in the last instruction, cannot disable itself to promptly accept such delivery, and if in this case you find that it

entered into a contract or option with the Kapiolani Estate, Limited, by which it bound itself not to remove the railroad material in question for thirty days, such agreement would discharge the surety from further obligation, and your verdict must be for the defendants."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 86.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

"Entering into the negotiation and receiving the option (defendants' Exhibit 11), if you find such to be the fact, by the Kapiolani Estate, Limited, would estop it to claim as against the plaintiff in this action the property in suit, and the plaintiff and the Kapiolani Estate, Limited, are both presumed to know this to be the law, and you may consider the fact as bearing on the question of good faith of the plaintiff in not accepting the tender if you find such tender to be made."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 87.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

"I instruct you that even though it may be necessary for the defendant in a replevin action where the plaintiff has won his case against the defendant, to seek out the plaintiff and tender plaintiff the property, nevertheless, if the plaintiff has sought out the defendant and demanded of defendant a delivery of the property sued for, the plaintiff has waived its right to claim that the defendant should have sought plaintiff out, and such a waiver for the plaintiff is binding on the plaintiff in an action against the sureties on the re-delivery

bond, therefore, if you find from the evidence in this case that William W. Bierce, Ltd., sought out the defendant

Hutchins and demanded of him the property concerned in the replevin action, you must find that William W. Bierce, Ltd., in this action on the re-delivery bond against the sureties on the bond waived the right of claiming that it was the duty incumbent upon Hutchins to seek out William W. Bierce, Ltd., and tender the property to it without any demand from William W. Bierce, Ltd."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 88.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

I instruct you that the statute law under which the re-delivery bond was given as well as all other law of the Territory of Hawaii at the time of execution and delivery of the re-delivery bond entered into and formed a part of the contract of sureties, one of which was Henry Waterhouse, deceased, the executors of whose will and estate are defendants in this action, and that the said defendants are not bound by any acts done in pursuance of the amendment of the Organic Act of March 3, 1905, and I therefore instruct you to render a verdict for defendants."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

1179

Exception No. 89.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

"I instruct you that the contracts of sureties are closely scrutinized, that sureties are favorites in the law and that the courts always compel the utmost good faith on behalf of the creditor in all his dealings whereby he seeks to create a liability of the surety on his bond and if by the creditor's acts the contract of the surety is altered, enlarged or changed or he is otherwise injuriously prejudiced beyond the very terms of his *conduct* he is released; accordingly if you find from the evidence that the plaintiff first endeavored to sell the property concerned in the replevin suit and then adopted a change of policy and endeavored to then create a surety's liability on the bond, the sureties are thereby released.

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 90.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

"If you find from the evidence that the plaintiff William W. Bierce, Ltd., in its dealings with Alexander & Baldwin, Ltd., or its dealings with the Kapiolani Estate, Ltd., or with others, treated or dealt with the property concerned in the replevin action as its own, and under its control then as a matter of law I charge you that by

such acts they waived any tender of said property by the principal or surety of the re-delivery bond, and the surety, the executors of the Estate of Henry Waterhouse, are released and your verdict should be for the defendants."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 91.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

"I instruct you that if you should find from the evidence that even though plaintiff's agent, H. E. Cooper, believed he could not obtain certain portions of the property at Kona, Hawaii, still that did not discharge him representing William W. Bierce, Ltd., or discharge or relieve William W. Bierce, Ltd. from receiving any other portion of the property situated at Kona, Hawaii, which you find from the evidence was tendered him."

The court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 92.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

"I instruct you that a refusal to accept tender is a waiver of tender, and if from the evidence you find that William W. Bierce, Ltd., through its agents or attorneys refused to accept the tender of the property from Clinton J. Hutchins, Trustee, or his agent, then it was not necessary for, and Clinton J. Hutchins, Trustee, was not called upon to go upon the premises at Kona and point out each individual item of the property covered by replevin action, and the sureties, the Waterhouse Estate, are released by such waiver of tender."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

Exception No. 93.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

"I instruct you that although you may find from the evidence that there were certain claims against the property in question at the

time of the tender, still nevertheless if you find from the evidence that the plaintiff acting in good faith was not influenced by said claims, then said claims cannot be urged by plaintiff as a ground for a refusal to accept a tender."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

1182

Exception No. 94

(As Amended).

Said defendants further requested the Court, in writing, to give to the jury the following modified instruction:

"Although, gentlemen of the jury, I have heretofore instructed you that certain facts are undisputed in the evidence on trial, there are however certain other facts which are also undisputed in the evidence which are as follows:

"That prior to and at the time of the execution of the re-delivery bond, William Bierce Ltd. had knowledge of the situation of the property in question in Kona, Hawaii, that said property was not piled up or stored, but was laid down and used as a plantation railway and equipment; and that at no time during the replevin action or the times referred to in the evidence in this action on the bond was any of said property removed away from the premises or so-called Kona Plantation; that at the time the special execution introduced in evidence was issued on said judgment on April 15, 1904, the defendants had appealed to the Supreme Court of Hawaii from the judgment of the Circuit Court which had issued such execution; that at the time said bond was executed no appeal could be maintained from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States. That after the decision of the Supreme Court of said Territory on January 28, 1905, in favor of defendants, there was enacted on March 5, 1905, an amendment to the Organic Act of the Territory of Hawaii permitting such appeals where the amount in controversy exceed \$5,000 and under and by virtue of the provisions of said Act of March 5, 1905, William W. Bierce, Ltd. prosecuted its appeal to the Supreme Court of the United States.

That while Albert Waterhouse, one of the executors of the
1183 Estate of Henry Waterhouse, deceased, to whom said claim was presented on September 30, 1904, was communicating to his co-executor William Waterhouse in Pasadena, California, as to said claim, and before any conclusion had been reached as to any action on said claim plaintiff on October 11, 1904, instituted this action."

The Court refused to give such requested modified instruction to the jury as requested, but gave such instruction further modified, as follows:

"That prior to and at the time of the execution of the re-delivery

bond, William Bierce Ltd. had knowledge of the situation of the property in question in Kona, Hawaii, that said property was not piled up or stored, but was laid down and used as a plantation railway and equipment; and that at no time during the replevin action or the times referred to in the evidence in this action on the bond was any of said property removed away from the premises or so called Kona Plantation; that at the time the special execution introduced in evidence was issued on said judgment on April 15, 1904, the defendants had appealed to the Supreme Court of Hawaii from the judgment of the Circuit Court which had issued such execution."

To the refusal of the court to give such requested modified instruction as requested, defendants in the presence of the jury and before they had retired to consider their verdict, duly excepted and said refusal of the court is here and now assigned as error by the court.

1184

Exception No. 95.

Said defendants further requested the Court, in writing, to instruct the jury as follows:

"I instruct you that a surety is entitled to stand upon the letter of his contract. To the extent and in the manner and the circumstances pointed out in his obligation he is bound and no further, and you are accordingly instructed that the options of William W. Bierce, Ltd., to Alexander & Baldwin, Ltd., Kapiolani Estate, Ltd., and C. J. Hutchins, Trustee, may be considered by you together with other facts upon the question as to whether or not as far as the rights of the sureties are concerned as defined by the instructions of the Court, a sufficient tender was made by Hutchins to Wm. W. Bierce, Ltd."

The Court refused to give such requested instruction to the jury, to which refusal of the Court defendants in the presence of the Jury and before they had retired to consider their verdict, duly excepted, and said refusal of the Court is here and now assigned as error by said defendants.

1185

Exception No. 96.

Thereafter, and at the request of the plaintiff, the Court instructed the jury as follows:

"GENTLEMEN OF THE JURY: The Court instructs you that the following facts are undisputed in the evidence on this trial, namely:

"That Clinton J. Hutchins, trustee, as principal and Henry Waterhouse and Arthur B. Wood, as sureties, executed to the plaintiff, William W. Bierce, Limited, on July 21st, 1903, the so-called return or re-delivery bond mentioned in the evidence; that said bond was executed and delivered to the High Sheriff and filed by him in the action of replevin mentioned in the evidence in which it was entitled, and that the conditions thereof were that if the property in controversy in said replevin suit, and all thereof, should be well and truly delivered to the plaintiff therein, said William W. Bierce, Ltd., if such delivery should be adjudged, and payment to said plaintiff should be well and truly made of such sum as might for any cause

be recovered against the defendant, Clinton J. Hutchins, Trustee, then said obligation should be null and void, otherwise to be and remain in full force and effect; also, that thereafter, on the 19th day of March, 1904, William W. Bierce, Limited, the plaintiff in said action of replevin, recovered judgment therein in this court against the defendant therein, Clinton J. Hutchins, Trustee, adjudging that he forthwith return into the possession of the plaintiff the railroad rails, locomotives, cars, spikes, joints and other railway material constituting all of the property in controversy, and further adjudging that said William W. Bierce, Limited, have and recover from said Clinton J. Hutchins, Trustee, the sum of ten hundred and forty-five dollars as damages for the detention of said property

from the 1st day of June, 1903, until the date of said judgment, together with the costs of said action, taxed at the sum

of fifty dollars and fifty cents; also adjudging that on failure

of said Clinton J. Hutchins, Trustee, to forthwith make such return of said property into the possession of said plaintiff, that said plaintiff, William W. Bierce, Limited, have and recover from said defendant, Clinton J. Hutchins, Trustee, the value of said property, found and adjudged to be twenty-two thousand dollars, together with the aforesaid sum of ten hundred and forty-five dollars, damages for detention, and costs taxed at fifty dollars and fifty cents;

Also that thereafter, on April 15th, 1904, the special execution introduced in evidence was issued on said judgment, which was, thereafter, on the 23rd day of May, 1904, returned into the court by the sheriff, unsatisfied; Also that thereafter, on exceptions taken and prosecuted by said Clinton J. Hutchins, Trustee, the Supreme Court of the Territory of Hawaii entered judgment in said action of replevin, on the 6th day of May, 1905, reversing the said judgment in this court therein and sustaining the exceptions of the defendant, Clinton J. Hutchins, Trustee, insofar as they raised the question of election, and remanding said suit to this court with directions to enter judgment for the defendant therein, with costs; Also that thereafter, on the 8th day of April, 1907, on an appeal prosecuted from said judgment of said Supreme Court by said William W. Bierce, Limited, to the Supreme Court of the United States, the latter court entered its judgment therein, reversing said judgment of the Supreme Court of this Territory and awarding to said William W. Bierce, Limited, its costs of said appeal, and remanding said cause to the Supreme Court of this Territory for further proceedings, in accordance with the mandate and opinion of the Supreme Court of the United

States filed therein; Also, that thereafter, on the 27th day of September, 1907, the Supreme Court of the Territory of

Hawaii, in accordance with said mandate and opinion, entered judgment in said action in favor of said William W. Bierce, Limited, and against said Clinton J. Hutchins, Trustee, for the sum of seven hundred and forty-eight dollars and fifty-seven cents costs, which judgment remains unpaid and unsatisfied; also, that thereafter, in accordance with said mandate and opinion of the Supreme Court of the United States, the Supreme Court of the Territory of Hawaii

made and entered an order in said action of replevin overruling the exceptions of said defendant, Clinton J. Hutchins, Trustee, a notice and certified copy of which said order constituting the mandate of said Supreme Court has been filed in this court in said action of replevin, the effect of which is to leave the said judgment of this court in full force and effect, the same as if no judgment of reversal thereof had ever been rendered by the Supreme Court of this Territory; Also that on or about the 18th day of April, 1904, the defendant Clinton J. Hutchins, Trustee, paid to the plaintiff William W. Bierce, Limited, the amount of the damages for detention, ten hundred and forty-five dollars and costs taxed at fifty dollars and fifty cents recovered by the said judgment of this court, together with interest on the value of the property in controversy therein, adjudged to be twenty-two thousand dollars from the date of said judgment, March 1904, until the date of the issuing of said execution, April 15th, 1904, the three items so paid amounting in all to the sum of eleven hundred and ninety-eight dollars and twenty-five cents; aside from which nothing has been paid on said judgment to the plaintiff, William W. Bierce, Limited, and the sum of twenty-two thousand dollars therein adjudged to be the value of the property in question, has not nor has any part thereof, not 1188 interest on said sum since the 15th day of April, 1904, been paid to the plaintiff, William W. Bierce, Limited; Also, that on or about the 20th day of February, 1904, Henry Waterhouse, one of the sureties on said re-delivery bond, died at Honolulu, leaving a will, in which he appointed the defendants, William Waterhouse and Albert Waterhouse as executors thereof, and that said will was admitted to probate and letters testamentary thereon were duly granted and issued to said executors by this court on or about the 4th day of April, 1904; Also, that thereafter and before the beginning of this action the plaintiff presented to the said executors its claim against the estate of the said Henry Waterhouse, deceased, for the value of said property as so adjudged to be the sum of twenty-two thousand dollars, with interest thereon, which claim was rejected by said executors."

Said defendants in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 97.

The Court at the request of the plaintiff further instructed the jury as follows:

"The principal questions which you will have to consider are, whether the property involved in the replevin case has been returned to the plaintiff; or, if not, whether any actual and sufficient tender of the property was made to the plaintiff by Hutchins."

Said defendants in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the

1189 Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 98.

The Court at the request of the plaintiff further instructed the jury as follows:

"The Court instructs the jury that the said Henry Waterhouse by executing the said re-delivery bond, as one of the sureties thereon, in contemplation of law authorized said Clinton J. Hutchins, Trustee, to represent him in said action of replevin, and said Waterhouse thereby became identified with said Clinton J. Hutchins, Trustee, in interest and claimed in privity with him, so as to be concluded by the proceedings and judgment in said replevin suit, and that the record of the proceedings and judgment in said suit are also conclusive and binding upon the defendants in this suit, William Waterhouse and Albert Waterhouse, as executors under the will and of the Estate of Henry Waterhouse, deceased."

Said defendants in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 99.

The Court at the request of the plaintiff further instructed the jury as follows:

"The Court instructs you that by executing said re-delivery bond the obligors therein, including said Henry Waterhouse, admitted that said Clinton J. Hutchins, Trustee, had possession of the property in controversy at the commencement of said replevin suit, and that said property was taken out of his possession when levied upon and seized by the sheriff in said suit, and was returned into his

1190 possession by the sheriff upon the execution and delivery of said bond; and that these admissions cannot be controverted on this trial but are binding and conclusive upon the defendants in this suit, who, in respect to any of the matters so admitted, are estopped from alleging that the contrary is true."

Said defendants in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 100.

The Court at the request of the plaintiff further instructed the jury as follows:

"The Court instructs the jury, with reference to the written offer to return the property in question, signed by Clinton J. Hutchins, Trustee, and delivered to the plaintiff's attorneys, bearing date the

18th day of April, 1904, which has been introduced in evidence by the defendants, that the delivery of this written offer did not alone and by itself constitute a return of the property in question such as to relieve the defendants from liability in this action; and that unless you believe from the evidence that the delivery of said written offer was accompanied by such action on the part of said Clinton J. Hutchins, Trustee, as would enable the plaintiff or its attorneys to obtain actual possession of the property in question, your verdict should be for the plaintiff."

Said defendants in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

1191

Exception No. 101.

The Court, at the request of the plaintiff, further instructed the jury as follows:

"The Court instructs the jury that it is a question of fact for the jury to determine from all the facts and circumstances proved on the trial whether *nor* not said Clinton J. Hutchins, Trustee, made a bona fide tender of the property in question to the plaintiff's attorneys. That in order than an offer such as that introduced in evidence on this trial may constitute such a bona fide tender, it is the law that it must be made in good faith for the purpose and with the intention of putting the party to whom it is made in possession of the property, and that it be not made colorably or for the purpose of laying the foundation for future litigation or defenses, without any intention of actually surrendering the property; and if you believe from the evidence that the offer in question was not made by said Clinton J. Hutchins, Trustee, in good faith for the purpose and with the intention of putting William W. Bierce, Limited in actual possession of the property in question, your verdict should be for the plaintiff."

Said defendants in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 102.

The Court, at the request of plaintiff, further instructed the jury as follows:

"In regard to the deed dated June 13, 1903, which is in evidence, by which Clinton J. Hutchins, Trustee, conveyed the property in question to the Henry Waterhouse Trust Company, I instruct you that the recording of that deed in the Registry Office gave notice to the plaintiff that the legal title to the property had been transferred by Hutchins to the Henry Waterhouse Trust Company; and if you find from the evidence that an actual

tender was made of the property by Hutchins and refused by the plaintiff, you may take into consideration the fact that said conveyance to the Waterhouse Trust Company was on record in deciding whether plaintiff was justified in refusing the tender."

Said defendants, in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 103.

The Court, at the request of plaintiff, further instructed the jury as follows:

"The court instructs the jury, with reference to the question whether or not Clinton J. Hutchins, Trustee, returned the property in question to plaintiff, or made an actual tender of the property to the plaintiff, in good faith, that the meaning of the conditions of the re-delivery bond in evidence was not that said Clinton J. Hutchins, Trustee, would allow the plaintiff, William W. Bierce, Limited, to hunt up the property and get it if it could, but was that he would return it to the plaintiff, if the plaintiff succeeded in the action of replevin, and, while it is true that the property in question was so heavy and bulky as to make it difficult of actual manual delivery, and that the rule as to delivery is less strict as to such property than as to smaller articles, still it was the duty of Clinton J. Hutchins, Trustee, to take such action as would enable the plaintiff to obtain actual possession of the property, and unless the
1193 jury believe from the evidence that he had done this then he had not returned the property to the plaintiff within the meaning of the statute and the conditions of the bond, and your verdict should be for the plaintiff."

Said defendants, in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 104.

The Court further gave to the jury plaintiff's requested instruction No. 8, modified as follows:

"The court instructs the jury that the judgment in the replevin suit imposed upon Clinton J. Hutchins, Trustee, the duty of taking active measures to surrender the property to William W. Bierce, Limited, and not merely the duty of passive submission to a forcible taking of the property by legal process. Under the law it was the duty of Clinton J. Hutchins, Trustee, to seek William W. Bierce, Limited, or its representatives, and deliver the property to them if they would receive it; and if the jury believe from the evidence that he failed to do this such failure constituted a breach of the conditions of the bond, rendering him and his sureties liable."

Said defendants, in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

1194

Exception No. 105.

The Court, at the request of the plaintiff, further instructed the jury as follows:

"The mere writing and sending of a letter to the plaintiff's attorneys that the property was offered and delivered to the plaintiff would not be sufficient. When the judgment was entered in the replevin action in favor of the plaintiff, it became the duty of the defendant Hutchins to redeliver the property to the plaintiff or pay its value. The writing of such a letter would not amount to a delivery unless Hutchins followed it up and supplemented it with active steps to secure to the plaintiff an actual delivery of the property. In this connection you are entitled to take into consideration any evidence which may tend to show whether at the time any such offer was made the property was on land belonging to Hutchins or on land belonging to other persons and over which he had no control. The plaintiff was not required to go upon the lands of third persons to locate the property and get it if it could."

Said defendants, in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 106.

The Court further gave to the jury plaintiff's requested instruction No. 10, modified as follows:

"An offer or tender to deliver property in order to be effectual must be made in good faith. Whether or not the offer claimed to have been made by Hutchins to return the property in question was made in good faith is for you to decide upon the evidence 1195 in this case. In this connection you should consider whether it has been shown that at the time the offer was made Hutchins had authority to return the property."

Said defendants, in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 107.

The Court, at the request of the plaintiff, further instructed the jury as follows:

"I instruct you that under the judgment which was rendered in the replevin case it became the duty of the defendant to return all

of the property in question. The plaintiff was not required to accept a portion of it, nor was the sheriff authorized to accept any portion of it, less than the whole. If, therefore, you believe from the evidence that a part only of the property was tendered, or that some of it was so situated that it could not for any reason be delivered by Hutchins to the plaintiff, your verdict must be for the plaintiff."

Said defendants, in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 108.

The Court, at the request of the plaintiff, further instructed the jury as follows:

"I charge you that the return of the deputy sheriff which is indorsed on the execution, to the effect that he was unable to levy the writ on the property therein described and that he
1196 therefore returned the writ unsatisfied, is a part of the record of this Court in the replevin case, and as such it imports absolute truth and is binding and conclusive on the defendants as to all acts done under and pursuant to the writ while it was in the hands of the deputy sheriff. You are therefore instructed, in considering your verdict, to disregard all testimony that you may find which tends to contradict the return of the deputy sheriff, relating to the time the execution was in his hands."

Said defendants, in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 109.

The Court, at the request of the plaintiff, further instructed the jury as follows:

"The Court instructs the jury that nothing short of an absolute or unconditional tender of the property in question to the plaintiff would relieve the obligors of the bond from liability to the plaintiff for the value of the property, and if you believe from the evidence that the offer of Hutchins to return the property in question to the plaintiff was made upon any conditions or condition, then it would not constitute a defence to this action."

Said defendants, in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

1197

Exception No. 110.

The Court, at the request of the plaintiff, further instructed the jury as follows:

"I instruct you that upon the return of the execution in evidence in this case, the right at once accrued to the plaintiff to maintain its action against the principal and sureties on the re-delivery bond for the value of the property as fixed in the judgment in the replevin case, with legal interest thereon and such costs as may have been properly taxed against the defendants in that case, and nothing else than the payment of such value, interest and costs would constitute a defense to this action."

Said defendants, in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 111.

The Court further gave to the jury plaintiff's requested instruction No. 15, modified as follows:

"If you find from the evidence that a substantial portion of the property in question, at the time the execution was in the hands of the sheriff, was on land belonging to the Kapiolani Estate, and that such land was fenced on both sides, and portions of the rails had been taken up so that the locomotive and cars on the track could not be readily moved off; and if you also find that Scott was prohibited from going upon that land and taking the property off, your verdict must be for the plaintiff, provided you find from the evidence that the plaintiff has in all others respects made out its case."

Said defendants in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving
1198 by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 112.

The Court further gave to the jury plaintiff's requested instruction No. 16, modified as follows:

"If you find from the evidence that the rails in question or a substantial part of them were lying on lands of third persons, and that neither Hutchins nor Scott made an attempt to secure the delivery of them to the sheriff, your verdict must be for the plaintiff, then you may consider these facts in arriving at your verdict."

Said defendants in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 113.

The Court, at the request of the plaintiff further instructed the jury as follows:

"The Court instructs the jury that the fact that the suit was discontinued during the trial, as against the defendants Clinton J. Hutchins, Trustee and Arthur B. Wood, the two surviving obligors on the re-delivery bond mentioned in the evidence, cannot properly be considered by the jury in reaching a verdict in this case; that the plaintiff could not properly have proceeded to trial against the present defendants without discontinuing its suit as against said survivors, and the jury will not consider such discontinuance as a circumstance unfavorable to the plaintiff's case or as any evidence of an intention on the part of the plaintiff to release said 1199 obligors from their liability on said bond, if the jury believe from the evidence that they are liable thereon; and the jury are instructed to disregard any and all remarks made by counsel in the presence or hearing of the jury to the effect that such discontinuance tends to prove an intention on the part of the plaintiff to release said surviving obligors."

Said defendants in the presence of the jury, and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 114.

Said Court, at the request of the plaintiff, further instructed the jury as follows:

"In regard to the document which has been received in evidence, dated April 14, 1904, being an option given to the Kapiolani Estate by the plaintiff for the sale of the property in question, I charge you that the Court having decided in the replevin case that the property belonged to the plaintiff, the plaintiff had the right to sell it or give an option on it whether plaintiff had actual possession of it at the time or not, and the option in question or any similar option could therefore have been given without prejudicing in any way the plaintiff's claim that Hutchins had not made a re-delivery of the property."

Said defendants in the presence of the jury and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

1200

Exception No. 115.

Said Court, at the request of the plaintiff, further instructed the jury as follows:

"In regard to the deed of conveyance dated November 7th, 1905, from Clinton J. Hutchins, Trustee, to Francis B. McStocker, I

instruct you that the legal construction and effect of that document was to convey to McStocker all of the property sold and conveyed to Hutchins by F. L. Dortch, receiver of the Kona Sugar Company, which he, Hutchins, had not already conveyed to the C. J. Falk and J. R. Sloan mentioned in said deed."

Said defendants in the presence of the jury and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 116.

Said Court, at the request of the plaintiff, further instructed the jury as follows:

"The Court instructs the jury that in determining the weight to be given to the testimony of the several witnesses you should take into consideration their interest in the event of the suit, if any such is proved; their apparent candor or lack of candor, their apparent fairness or bias, if any such appears; their appearance and manner on the stand; the reasonableness or unreasonableness of the story told by them, and all the facts and circumstances tending to corroborate or contradict such witnesses, if any such are proved."

Said defendants in the presence of the jury and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

1201

Exception No. 117.

The Court further gave to the jury plaintiff's requested instruction No. 21, modified as follows:

"The Court instructs you that in passing upon the testimony of the witnesses you have a right to take into consideration any interest which such witnesses may have in the result of this suit, if any is proved, and to give to the testimony of such witnesses only such weight as you think it entitled to under all the circumstances proved on the trial."

Said defendants in the presence of the jury and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 118.

Said Court, at the request of the plaintiff, further instructed the jury as follows:

"The Court instructs the jury with reference to all questions to which objections have been sustained by the Court and all testimony of witnesses which has been stricken out by the Court, as well as with reference to all papers and documents which have been offered

but not received in evidence, that the jury should disregard all such matters as well as all remarks of counsel in relation thereto, if any have been made, and should consider only the evidence actually introduced on the trial in arriving at their verdict."

Said defendants in the presence of the jury and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

1202

Exception No. 119.

Said Court, at the request of the plaintiff, further instructed the jury as follows:

"If the jury believe from the evidence that any witness has wilfully sworn falsely on this trial, as to any matter or thing material to the issues in the case, then the jury are at liberty to disregard the entire testimony of such witness, except insofar as it has been corroborated by other credible evidence or by facts and circumstances proved on the trial."

Said defendants in the presence of the jury and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 120.

Said Court, at the request of the plaintiff, further instructed the jury as follows:

"The Court instructs the jury that while the burden of proof rests upon the plaintiff to make out its case by a preponderance of the evidence, still the preponderance of the evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their apparent candor or lack of candor, if any; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial; and from all these circumstances determine upon which side is the weight or preponderance of the evidence."

1203

Said defendants in the presence of the jury and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 121.

Said Court, at the request of the plaintiff, further instructed the jury as follows:

"The jury are instructed that it is not proper for counsel, in the argument of a case, to state any matter or things bearing upon the questions of fact, and claimed to be within his own personal knowledge or which may have been stated to him by others, not witnesses in the case; and you are further instructed to disregard all such statements, if any have been made, and to make up your verdict upon the evidence actually given in this case, without placing any reliance upon or giving any credit to any statements of counsel not supported by the evidence. In determining any of the questions of fact presented in this case you should be governed solely by the evidence introduced before you."

Said defendants in the presence of the jury and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

1204

Exception No. 122.....

Said Court, at the request of the plaintiff, further instructed the jury as follows:

"The Court instructs you that while an attorney is a competent witness for his clients on the trial of a cause, and the testimony of such a witness should not be disregarded by you simply because he is an attorney testifying in favor of his own clients, still in such a case the jury are the judges of the weight and credit to which such testimony is entitled, and it is proper for you to take into account the fact of such relation of attorney and client in determining the degree of weight which ought to be given to the testimony of such witness."

Said defendants in the presence of the jury and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 123.

Said Court, at the request of the plaintiff, further instructed the jury as follows:

If the jury find the issues for the plaintiff, by their verdict, they should assess the plaintiff's damages in their verdict at the sum of twenty-two thousand dollars (\$22,000.) determined to be the value of the property in question by the judgment in replevin, with interest thereon at the rate of six per cent. (6%) per annum, from April 15th, 1904, [until the date of the verdict,]* to which should

[* Words enclosed in brackets erased in copy.]

be added seven hundred and forty-eight dollars and fifty seven cents (\$748.57), the amount of the judgment for costs rendered by the Supreme Court of the Territory on September 27th, 1907, in favor of

William W. Bierce, Limited, and against Clinton J. Hutchins, Trustee, with interest thereon at the rate of eight per cent. (8%) per annum from September 27th, 1907, [until the date of the verdict]* aggregating the sum of \$28,156.74."

Said defendants in the presence of the jury and before the jury had retired to consider their verdict, excepted to the giving by the Court of said instruction to the jury, and the giving of said instruction is here and now assigned as error by said defendants.

Exception No. 124.

Thereafter, and after the Court had charged the jury, the jury retired to consider their verdict, and subsequently returned into Court and rendered the following verdict, to wit:

1206 In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1908.

Law. 6023. Dock. 26/60.

WM. W. BIERCE, LTD.,

v.

WM. WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Verdict.

We, the jury in the above entitled cause find for the plaintiff and against the defendants Wm. Waterhouse and Albert Waterhouse as executors under the will and of the Estate of Henry Waterhouse deceased for the sum of \$22,000.00 with interest thereon at the rate of 6% per annum from April 15th 1904, also for the sum of \$748.57 with interest thereon at the rate of 8% per annum from September 27th 1907, the aggregate sum of the principal and interest being \$28,156.74.

Honolulu, T. H., May 22nd, 1908.

(Sig.)

J. F. SOPER, *Foreman.*

Endorsed: L. 6023. Circuit Court, First Circuit, Territory of Hawaii. William W. Bierce, Ltd., v. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased. Verdict. Filed May 22nd, 1908, 9:46 P. M. Job Batchelor, Clerk.

1207 Thereupon, defendants in the presence of the jury excepted to said verdict as being contrary to the law and the evidence, and against the weight of the evidence, and gave notice of

motion for a new trial, and said verdict is here and now assigned as error by said defendants.

Exception No. 124A.

That after the jury had retired to consider their verdict and before said verdict was rendered as set out in Exception No. 124 herein the jury returned into court and requested to be permitted to take to the jury room the deed from F. L. Dortch to Clinton J. Hutchins, Trustee, referred to in Exception 24 herein, and the trust deed from C. J. Hutchins to the Henry Waterhouse Trust Company, Limited, referred to in Exception 66 herein, whereupon said defendants objected to said deeds being taken by the jury to the jury room, on the ground, first, that it was improper for said deeds to go to the jury, and second, that said deeds were incompetent, irrelevant and immaterial, which objections were by the court overruled and the jury allowed to take said deeds to the jury room, to which ruling of the court said defendants then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 125.

Thereafter, and on the 26th day of May, 1908, defendants moved the Court for Judgment *non obstante veredicto*, which said motion was in words and figures as follows, to wit:

1208 In the Circuit Court of the First Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Motion for Judgment Non Obstante Veredicto.

Now come the above named defendants, and move that judgment be entered in favor of the defendants and against the plaintiff, notwithstanding the verdict of the jury, on the following grounds:

1. That the complaint does not show any cause of action against these defendants.
2. That the action was prematurely brought and that no valid claim had been presented to the defendants and rejected by them, and that the evidence shows that a reasonable time had not elapsed after the alleged presentation of the claim before this action was brought in which to approve or reject said claim.
3. Upon all the grounds set out in plea in abatement filed by the defendants in this action.

4. That the evidence shows that there was no consideration given for the bond in suit, and that it is not binding on these defendants.

1209 5. That at the time when this action was brought the judgment entered against the principal defendant, Clinton J. Hutchins, Trustee, was stayed by the proceedings taken on the bill of exceptions to the Supreme Court of Hawaii, and that as against the defendants in this action the Circuit Court of the First Circuit had no authority to order any further bond or security on appeal to be given, or to order said judgment to be enforced or execution to issue thereon, since the act under which said orders were made went into force on August 1, 1903, subsequently to bringing of the replevin action of Bierce v. Hutchins, Trustee, and the giving of the re-delivery bond on which this suit was brought.

6. Because said judgment in the replevin action of Bierce v. Hutchins rendered in the Circuit Court of the First Circuit was reversed by the Supreme Court of Hawaii on the 28th day of January, 1905, and also by the order of May 6, 1905, and that at the time of the giving of the re-delivery bond upon which this suit was brought said judgment of the Supreme Court of Hawaii was final and conclusive as to these defendants, and that the subsequent passage of the act of Congress March 3, 1905, amending the Organic Act did not and could not affect the liability of these defendants and the sureties upon said bond, the said bond being entered into with reference to existing provisions of law and the same becoming a part of the contract; and the subsequent reversal of the decision of the Supreme Court of Hawaii and the entry of the order of said Supreme Court setting aside its former decision and overruling the exception does not affect the sureties on said bond or the liability of the defendants in this action, whose liability was terminated by the said proceedings in the Supreme Court of Hawaii January 28, 1905, and May 6, 1905.

1210 6a. That the contract of the sureties on the re-delivery bond was altered, changed and *or* extended by the appeal to the Supreme Court of the United States under and by virtue of the amendment of March 3, 1905, of the Organic Act by the plaintiff in the said replevin action of Bierce vs. Hutchins, Trustee.

7. Because the affidavit in replevin and the complaint based on the affidavit setting out the sworn value of the property in suit, upon which affidavit and complaint by law the re-delivery bond is based, which bond recites that the property is "of the value of \$15,000, as stated in the affidavit filed herein," is and are judicial admissions made by the plaintiff in this action, upon which the sureties in signing said re-delivery bond had a right to rely, and as to the sureties, the defendants in this action the plaintiff is estopped to claim that the value of said property is more than \$15,000; and the subsequent proceedings by which the allegations of said complaint were amended to increase the alleged value first to \$20,000 and then to \$22,000, and the recovery of judgment for \$22,000 as to the value of said property, operated to release the sureties from

the obligation of said re-delivery bond and are not binding against said sureties, the defendants in this action.

8. That the amendment to the complaint in said action by which the cause of action is alleged to arise wholly out of the contract of March 13, 1901, and not out of the contract of February 21, 1901, constituted a change of the cause of action upon which said re-delivery bond was given and released the sureties from their obligation under any judgment rendered in said action.

9. Because the uncontradicted evidence shows an offer to return the property in accordance with said bond, and a tender of the same, which discharged the sureties upon said bond.

1211 10. That, whether a valid tender of said property were made or not, the offer to return, duly made, was so far accepted by the plaintiff that it operated as a discharge of the sureties upon the said bond.

11. That the so-called option to the Kapiolani Estate, Limited, and the notice to it given by the plaintiff April 19, 1904, subsequent to said offer to return, by means of which the plaintiff disabled itself for thirty days to remove the property from its *situs*, coupled with its notice to the defendant in the suit not to use or disturb the property in the meantime, and the fact that the uncontradicted evidence in this case shows that no action was taken by the plaintiff until after the expiration of said thirty days, viz., until the 20th day of May, 1904, and that the said defendant, Clinton J. Hutchins, Trustee, did not disturb or use said property during said time, in law discharged the sureties upon said bond from further liability.

12. That after the Kapiolani Estate, Limited, on April 14, 1904, had accepted from plaintiff a thirty-day option to purchase the property covered by the replevin bond, and while said option was outstanding and in force and effect, the said plaintiff had caused execution to issue in the replevin action and to be delivered into its possession on April 15, 1904, it then and there became the duty of the said plaintiff, acting in good faith to the surety on the replevin bond, to cause said execution to be immediately placed in the hands of the sheriff and executed; that said execution was not so immediately executed, but on the contrary was held and secreted in the hands of plaintiff's attorneys at law and in fact was not placed in the hands of the deputy sheriff for the purpose of execution until May 1212 21 or May 23, 1904, and after said option had expired; that said delay was prejudicial to the rights of the surety, and as a matter of law released the surety.

13. That the original action was still pending at the time when this suit was brought.

14. That there is no evidence upon which a verdict could be rendered for any sum against these defendants.

Dated, Honolulu, May 26, A. D. 1908.

(Sig.)

(Sig.)

SMITH & LEWIS,

CASTLE & WITHINGTON,

Attorneys for Defendants.

Endorsed: Original — No. 6023. Circuit Court, First Circuit, Territory of Hawaii. 26/60. William W. Bierce, Limited, a Corporation, Plaintiff, vs. William Waterhouse and Albert Waterhouse, Executors, etc., Defendants. Motion for Judgment Non Obstante Veredicto. Filed May 26th, 1908, 9:8 A. M. Job Batchelor, Clerk. Castle & Withington, Attorneys for Defendants. Motion denied, May 25/08. J. B.

1213 Said motion for Judgment *non obstante veredicto* was by the Court overruled, to which ruling of the Court defendants duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 126.

Thereafter, and within the time provided by law, defendants moved the Court for a new trial of said action, said motion being in words and figures as follows, to wit:

1214 In the Circuit Court of the First Circuit, Territory of Hawaii, 1908 Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Motion for New Trial.

The defendants, William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, come and move that the verdict in said action and judgment entered therein be set aside, and for a new trial, upon the following grounds:

1. That the verdict and judgment are against the law.
2. That the verdict and judgment are against the evidence and the weight of the evidence.
3. Errors of law occurring during the trial, in the admission and rejection of evidence, and excepted to by these defendants.
4. Refusal to give instructions to the jury requested by these defendants, which refusal was excepted to by these defendants.
5. Errors in giving instructions to the jury requested by the plaintiff, the giving of which was excepted to by these defendants.

1215 defendants.

Without waiving other errors, the defendants specify, as particular errors referred to under subdivisions, 3, 4 and 5, the following:

I.

Errors in the Admission and Rejection of Evidence.

(a) The refusal to admit in evidence copy of the surrender from the Kapiolani Estate, Limited, to William W. Bierce, Limited, of the property in question, and the evidence of the witness John F. Colburn offered in connection with the same.

(b) The exclusion both by rejection and striking out, of the evidence of the witness Henry E. Cooper in regard to a change of policy on the part of the plaintiff in reference to securing possession of the property in question.

(c) The exclusion of the evidence of instructions from the plaintiff to its attorneys-in-fact and attorneys-in-law, Kinney, McClanahan and Cooper, in reference to obtaining possession of the property, asked on cross-examination of said witness when offered as a witness to show effort to obtain such possession.

(d) The refusal of the court to allow said witness, on cross-examination, to disclose what were the instructions of his principal under which he was acting at the time of his trip to Kona, which he had testified in chief he had made to get possession of the property and in reference to a change of policy on the part of said plaintiff in reference to said matter.

(e) The refusal to admit in evidence the letter of Kinney, McClanahan and Cooper dated April 19, 1904, or to allow the witness to refresh his recollection from said letter.

1216 (f) The refusal to allow the witness to testify on cross-examination that, as agent of the plaintiff, he dealt with the Kapiolani Estate, Limited, upon the idea that a surrender of the property had been executed by them.

(g) The admission in evidence of the trust deed from Clinton J. Hutchins, Trustee, to the Henry Waterhouse Trust Company, Limited, (Plaintiff's Exhibit "MM"), and the refusal to strike out the same.

(h) The admission in evidence of the notice from John Paris (Plaintiff's Exhibit "NN").

(i) The admission in evidence of the deeds from Hutchins to McStocker (Plaintiff's Exhibit "GG") and McStocker to Kona Development — (Plaintiff's Exhibit "HH"), long after the transactions in question, and the evidence of other dealings with said property long subsequent to the offer to return the property relied on by these defendants.

(j) The refusal to allow the witness Shingle to testify as to the relations between Clinton J. Hutchins, Trustee, and one Linder, shown at a subsequent time to have been using the property in question.

II.

Error in refusing to give defendants' Instructions Nos. 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 17, 18, 19, 20, 21, 22 and 24, and each of them.

III.

The giving of plaintiff's requests for instructions Nos. 2 (as modified) 2-a, 3, 4, 5, 6, 6a, 7, 8, 9, 10, 12, 13c, 13d, 14, 15, 16, 17, 18, 18a, 19, 20, 21, 22, 22a, 23, 24, 25, 26 and 29, and each of them.

6. That the complaint does not show any cause of action against these defendants.

1217 7. That the action was prematurely brought and that no valid claim had been presented to the defendants and rejected by them, and that the evidence shows that a reasonable time had not elapsed after the alleged presentation of the claim before this action was brought in which to approve or reject said claim.

8. Upon all the grounds set out in plea in abatement filed by the defendants in this action.

9. That the evidence shows that there was no consideration given for the bond in suit, and that it is not binding on these defendants.

10. That at the time when this action was brought the judgment entered against the principal defendant, Clinton J. Hutchins, Trustee, was stayed by the proceedings taken on the bill of exceptions to the Supreme Court of Hawaii, and that as against the defendants in this action the Circuit Court of the First Circuit had no authority to order any further bond or security on appeal to be given, or to order said judgment to be enforced or execution to issue thereon, since the act under which said orders were made went into force on August 1, 1903, subsequently to bringing of the replevin action of Bierce v. Hutchins, Trustee, and the giving of the re-delivery bond on which this suit was brought.

11. Because said judgment in the replevin action of Bierce v. Hutchins rendered in the Circuit Court of the First Circuit was reversed by the Supreme Court of Hawaii on the 28th day of January, 1905, and also by the order of May 6, 1905, and that at the time of the giving of the re-delivery bond upon which this suit was brought said judgment of the Supreme Court of Hawaii was final and conclusive as to these defendants, and that the subsequent passage of the act of Congress March 3, 1905 amending the Organic Act did

1218 not and could not affect the liability of these defendants and the sureties upon said bond, the said bond being entered into with reference to existing provisions of law and the same becoming a part of the contract; and the subsequent reversal of the decision of the Supreme Court of Hawaii and the entry of the order of said Supreme Court setting aside its former decision and overruling the exception does not affect the sureties on said bond or the liability of the defendants in this action, whose liability was terminated by the said proceedings in the Supreme Court of Hawaii January 28, 1905, and May 6, 1905.

12. That the contract of the sureties on the redelivery bond was altered, changed or extended by the appeal to the Supreme Court of the United States under and by virtue of the amendment of March 3, 1905, of the Organic Act, by the plaintiff in the said replevin action of Bierce v. Hutchins, Trustee.

13. Because the affidavit in replevin and the complaint based on

the affidavit setting out the sworn value of the property in suit, upon which affidavit and complaint by law the re-delivery bond is based, which bond recites that the property is "of the value of \$15,000, as stated in the affidavit filed herein," is and are judicial admissions made by the plaintiff in this action, upon which the sureties in signing said re-delivery bond had a right to rely, and as to the sureties, the defendants in this action the plaintiff is estopped to claim that the value of said property is more than \$15,000, and the subsequent proceedings by which the allegations of said complaint were amended to increase the alleged value first to \$20,000 and then to \$22,000, and the recovery of judgment for \$22,000 as the value of said property, operated to release the sureties from the obligation of said re-delivery bond and are not binding against said sureties, the defendants in this action.

1219 14. That the amendment to the complaint in said action, by which the cause of action is alleged to arise wholly out of the contract of March 13, 1901, and not out of the contract of February 21, 1901, constituted a change of the cause of action upon which said re-delivery bond was given and released the sureties from their obligation under any judgment rendered in said action.

15. Because the uncontradicted evidence shows an offer to return the property in accordance with said bond, and a tender of the same, which discharged the sureties upon said bond.

16. That, whether a valid tender of said property were made or not, the offer to return, duly made, was so far accepted by the plaintiff that it operated as a discharge of the sureties upon said bond.

17. That the so-called option to the Kapiolani Estate, Limited, and the notice to it given by the plaintiff April 19, 1904, subsequent to said offer to return, by means of which the plaintiff disabled itself for thirty days to remove the property from its *situs*, coupled with its notice to the defendant in the suit not to use or disturb the property in the meantime, and the fact that the uncontradicted evidence in this case shows that no action was taken by the plaintiff until after the expiration of said thirty days, viz., until the 20th day of May, 1904, and that the said defendant, Clinton J. Hutchins, Trustee, did not disturb or use said property during said time, in law discharged the sureties upon said bond from further liability.

18. That after the Kapiolani Estate, Limited, on April 14, 1904, had accepted from plaintiff a thirty-day option to purchase the property covered by the replevin bond, and while said option was
1220 outstanding and in force and effect, the said plaintiff had caused execution to issue in the replevin action and to be delivered into its possession on April 15, 1904, it then and there became the duty of the said plaintiff, acting in good faith to be immediately placed in the hands of the sheriff and executed; that said execution was not so immediately executed, but on the contrary was held and secreted in the hands of plaintiff's attorneys at law and in fact and was not placed in the hands of the deputy sheriff for the purpose of execution until May 21 or May 23, 1904, and after said option had expired; that said delay was prejudicial to the rights of the surety, and as a matter of law released the surety.

19. That the original action was still pending at the time when this suit was brought.

20. That there is no evidence upon which a verdict could be rendered for any sum against these defendants.

Dated, Honolulu, May 29, A. D. 1908.

(Sig.)

SMITH & LEWIS,

(Sig.)

CASTLE & WITHINGTON,

Attorneys for Defendants,

Executors Waterhouse Est.

Endorsed: Law 6023. Circuit Court, First Circuit, Territory of Hawaii. 1908 Term. William W. Bierce, Limited, a Corporation, Plaintiff, vs. Clinton J. Hutchins, Trustee, Arthur B. Wood, and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, Defendants. Motion for New Trial. Filed May 29, 1908, at 5:10 o'clock P. M. J. A. Thompson, Clerk. Smith & Lewis, Attorneys at Law, Honolulu, T. H. Judd Building.

1221 The Court thereafter denied said motion for a new trial, to which ruling of the Court defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendants.

Exception No. 127.

Thereafter, on the 29th day of May, A. D. 1908, as of the January Term, 1908, Judgment was rendered and entered in this action, said judgment being in words and figures as follows to wit:

1222 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term, A. D. 1908.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Judgment.

This action by complaint as amended, claiming Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages, came to the September Term A. D. 1904, and thence by continuance to the present Term, when the parties appeared, and were at issue to the jury.

Said cause having been heard and committed to the jury, they find for the plaintiff to recover Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages.

Therefore it is ordered and adjudged by the Court that the plain-

tiff, William W. Bierce, Limited, do have and recover from the defendants, William Waterhouse and Albert Waterhouse as Executors under the Will and of the Estate of Henry Waterhouse, deceased, Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages, together with its attorneys' fees or commissions taxed at Seven Hundred Eleven and 42/100 Dollars (\$711.42) and its costs taxed at (\$81.45) to be paid in due course of administration.

By the Court:

(Sig.)

[SEAL.]

JOB BATCHELOR,

Clerk.

Entered this 29th day of May, 1908, as of the January Term, 1908.

Endorsed: Law 6023. Circuit Court, First Judicial Circuit. William W. Bierce, Limited, vs. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased. Judgment. Filed May 29th, 1908, at 3:45 o'clock P. M. L. P. Scott, Clerk.

1224 Defendants duly excepted to the rendition and entry of said judgment, and said judgment is here and now assigned as error by said defendants.

And to the end that justice and right may be done, these defendants pray that this, their Bill of Exceptions herein, be settled, allowed and approved, as true and correct in all particulars. All records, papers, files, affidavits, exhibits, testimony and proceedings, stenographer's notes, stenographer's transcript and other papers, and documents in this action, are expressly made a part of this Bill of Exceptions and incorporated herein, as fully and completely as if they and each of them were actually set out herein in words and figures, and defendants further pray that all such records, papers, files, affidavits, etc., be, by order of Court, incorporated herein, as fully and completely as if they and each of them were actually set out herein in words and figures.

Dated, Honolulu, November 9th, A. D. 1908.

WILLIAM WATERHOUSE AND
ALBERT WATERHOUSE,

*Executors under the Will and of the Estate
of Henry Waterhouse, Deceased,*

(Sig.)

By SMITH & LEWIS,

Attorneys Defendants Above Named.

(Sig.) SMITH & LEWIS,

(Sig.) CASTLE & WITHINGTON,

(Sig.) JNO. W. CATHCART,

Attorneys for said Defendants.

The foregoing Bill of Exceptions duly presented to me for allowance this 12th day of November, 1908.

(Sig.)

J. T. DE BOLT,

First Judge.

1225 *Order Approving Foregoing Bill of Exceptions and Incorporating Therein All Files, Records, Exhibits, and Testimony.*

In the matter of the foregoing Bill of Exceptions, now duly presented in time by the said defendants William Waterhouse and Albert Waterhouse, executors under the Will and of the Estate of Henry Waterhouse, deceased, it is hereby ordered by said Court that said Bill of Exceptions being found conformable to the truth be and the same is hereby settled, allowed and approved as true and correct in all particulars.

And it is further ordered that all the [following]* records, papers, files and documents in said cause be and they are and each of them is hereby made a part of said Bill of Exceptions and incorporated therein as fully and completely as though they and each of them were actually set out therein in words and figures, to wit:

[Original]* Complaint.

Plea in Abatement to Complaint.

Amended Complaint.

Demurrer to Amended Complaint.

Answer.

Motion to set Cause for Trial.

Clerk's Minutes:

Jan. 3, 1906,	De Bolt Term	Vol. 1	p. 101
Apr. 3, 1906,	Lindsay Term	" 1	" 224
Apr. 6, 1906,	" "	" 1	" 232
Sept. 6, 1906,	Robinson Term	" 5	" 79
May 22, 1908,	De Bolt Term	" 2	" 326 et seq.
May 26, 1908,	" "	" 2	" 333
June 1, 1908,	" "	" 2	" 338

Subpoena issued by plaintiff for witness J. F. Colburn.

Instructions requested by plaintiff & defendant.

Verdict.

Motion for judgment non obstante ver-dicto.

Motion for New Trial.

Judgment.

Transcript of Evidence.

All Exhibits.

with amendments #5782 Bierce v. Hutchins

Plaintiff's Exhibit A. [and Amended]* Complaint Δ

1226

Plaintiff's Exhibit A. 2nd. Term Summons.
 3rd. Replevin Affidavit of E. B. McClanahan.
 4th. Plaintiff's service of notice to Sheriff.
 " " B. Replevin Bond, Return Bond & Stipulation
 filed May 2nd 1908.

[* Words enclosed in brackets erased in copy.]

- " " C. Defendants' Answer to Plaintiff's complaint.
- " " D. Plaintiff's motion for leave to amend complaint- affidavit of E. B. McClanahan.
- " " E. Stipulation for change of venue from Third Circuit to First Circuit.
- " " F. Defendants' Bond for Costs and Motion for a New Trial.
- " " G. Finding of facts.
- " " H. Conclusions of Law.
- " " I. Decision.
- " " J. Judgment.
- " " K. Order of March 23, 1904, sustaining plaintiff's objection.
- " " L. Notice and Motion.
- " " M. Order — March 28, 1904.
- " " N. Order — April 2, 1904.
- " " O. Notice & Motion.
- " " P. Order — April 8, 1904.
- " " Q. Execution issued Apr. 15/04.
- " " R. Clerk's Minutes, Mar. 7/04.
- " " S. Clerk's Minutes, Mar. 8/04.
- " " T. " " " 12/04.
- " " U. " " " 19/04.
- " " V. " " Apr. 8/04.
- " " W. Judgment entered by Supreme Court.
- " " X. [Affidavit of W. W. Bierce (last portion).]*
- " " X. Order U. S. Supreme Court allowing plaintiff's appeal. Pl'tf's appeal bond filed Jan. 13, 1906. Order supersedeas dated Mar. 5, 1906. Motion for Writ of Supersedeas accompanying order March 5. Assignment of Errors to U. S. S. C. filed Jan. 13, 1906.
- " " Y. [All documents mentioned in Friday's minutes.]*
- " " Y. Mandate of U. S. S. C. including order for costs & vacating order of May 6.
- " " Z. Decisions on exceptions & notice.
- " " XX. Assignment of Errors in evidence.
- " " AA. Certified Copy Notice of Decision from Supreme Court.
- " " BB. Affidavit of Publication Notice to Creditors.
- " " CC. Creditor's Claim No. 1, dated Sept. 6, 1904.
- " " DD. Letter dated Sept. 26, 1904 (rejection claim).
- " " EE. Creditor's Claim No. 2, dated Sept. 30, 1904.
- " " FF. Depositions of Columbus and E. W. Hayden and envelope containing same.

[* Words enclosed in brackets erased in copy.]

1227

Plaintiff's Exhibit	GG.	Memorandum of Calculation of Interest.
"	"	HH. Deed to C. J. Hutchins to F. B. McStocker.
"	"	II. Matter of Articles of Incorporation of W. W. Bierce, Ltd.
"	"	JJ. Deed — F. L. Dortth, receiver to C. J. Hutchins.
"	"	KK. Depositions of Columbus Bierce and Henry T. Gilbert.
"	"	LL. Letter dated April 26, 1904, Kinney, McClanahan & Cooper to C. J. Hutchins.
"	"	MM. Letter J. D. Paris to J. K. Nahale, dated May 21, 1904.
"	"	NN. Certified Copy of deed C. J. Hutchins to Henry Waterhouse Trust Co.

[Registered Post Office Receipt #15,725.]*

Defendants' Exhibit	1.	Letter dated Feb. 1, 1900, signed by Frank Davies.
"	"	2. " dated Apr. 18, 1904, Kinney, McClanahan & Cooper to Clinton J. Hutchins.
"	"	3. " dated April 18, 1904, Clinton J. Hutchins, Tr. to Messrs. Kinney, McClanahan & Cooper.
"	"	4. " dated April 21, 1904, Messrs. Kinney, McClanahan & Cooper to C. J. Hutchins.
"	"	5. " dated May 16, 1904, Kinney, McClanahan & Cooper to C. J. Hutchins.
"	"	6. " dated May 26, 1904, Cathcart & Milverton to Kinney, McClanahan & Cooper.
"	"	6A. " dated May 18, 1904, M. F. Scott to Kinney, McClanahan & Cooper.
"	"	7. " dated May 27, 1904, Kinney, McClanahan & Cooper to Cathcart & Milverton.
"	"	8. " dated May 27, 1904, Cathcart & Milverton to Kinney, McClanahan & Cooper.
"	"	9. " Carbon copy of Notice served by Scott on Nahale.
"	"	10. " dated Sept. 30, 1904, Kinney, McClanahan & Cooper to William Waterhouse & Albert Waterhouse.

[* Words and figures enclosed in brackets erased in copy.]

1228

- Defendants' Exhibit 11. An Agreement dated April 14, 1904, between W. W. Bierce, Ltd. and Kapiolani Estate.
- " " 12. Letter dated April 19, 1904, Kinney, McClanahan & Cooper to Kapiolani Estate, Ltd.
- 22 Defendants' Exhibit for Identification—Agreement Kapiolani Estate Ltd. with Bierce Co.
- 9 Defendants' Exhibit for Identification—Petition of M. F. Scott.
- 10 Defendants' Exhibit for Identification—Order of Court date May 21, 1902.

Done and dated at Honolulu, this 28th day of November, 1908.

(Signed)

J. T. DE BOLT,

*First Judge of the Circuit Court of the
First Judicial Circuit, Territory of Hawaii.*

Due service of the foregoing bill of exceptions is hereby admitted this 12th day of November 1908.

WILLIAM W. BIERCE, LIMITED,

Plaintiff,

(Signed) By A. G. ROBERTSON, *Its Attorney.*

Costs on Exceps. paid.

H. S.

Endorsed: S. C. N. 383. Bill of Exceptions in William W. Bierce Ltd. v. C. J. Hutchins, Tr. et al. Filed Nov. 28, 1908 12:25 P. M. Job Batchelor, Clerk.

1229 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

WILLIAM W. BIERCE, LIMITED, Plaintiff-Appellee,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants-Appellants.

On Exceptions from the Circuit Court of the First Circuit of the Territory of Hawaii.

1230 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

WILLIAM W. BIERCE, LIMITED, Plaintiff-Appellee,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants-Appellants.

On Exceptions from Circuit Court, First Circuit.

Index to Transcript of Record.

Contents.

	Pages.
1. Plaintiff's Bill of Complaint, annexed thereto, as Exhibit "A" thereof, is Copy of Return Bond.....	1-6
2. Plea in Abatement of William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, to the Bill of Complaint	7-9
3. Amended Bill of Complaint, annexed thereto as Exhibit "A" thereof is Copy of Return Bond.....	10-16
4. Demurrer of William Waterhouse and Albert Waterhouse Executors under the Will and of the Estate of Henry Waterhouse, deceased, to Amended Bill of Complaint	17-19
5. Answer of William Waterhouse and Albert Waterhouse Executors under the Will and of the Estate of Henry Waterhouse, deceased, to Amended Bill of Complaint	20
6. Motion by Plaintiff for continuance filed January 3, 1906, annexed thereto is the affidavit of A. G. M. Robertson	21-23
7. Motion by Plaintiff for continuance filed April 4, 1906, annexed thereto is the affidavit of A. G. M. Robertson	24-27

8. Affidavit of A. Lewis, Jr., in opposition to the Motion for continuance	28-29
9. Notice of Motion by Defendants to set cause for trial filed September 4, 1906.....	30
10. Instructions Requested by Plaintiff.....	31-74

1231 *Index—Continued.**Contents.*

	Pages.
11. Instructions Requested by Defendants William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased	75-99
12. Verdict	100
13. Motion by defendants for judgment <i>non obstante veredicto</i>	101-105
14. Motion by defendants William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased for a New Trial	106-112
15. Judgment	113
16. Extracts Clerk's Minutes Circuit Court First Circuit..	114-122
17. Subpena issued for John F. Colburn and Return of Service thereof.....	123
18. Præcipe	124-125
19. Clerk's Certificate to Transcript of Record.....	126-127

1232 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January (1905) Term.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants-Appellants.

Assumpsit.

(Stamped \$2.00.)

Complaint.

To the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Circuit:

Comes now the said plaintiff, William W. Bierce, Limited, and for cause of action against the said defendants, says:

That the plaintiff is now and at all the times hereinafter mentioned was a corporation duly organized under the laws of the State of Louisiana, and duly qualified to bring and maintain suit in this Territory; that the defendant Clinton J. Hutchins, Trustee,

is a resident of Honolulu, Island of Oahu, Territory of Hawaii; that the defendant Arthur B. Wood is also a resident of said Honolulu, and that the defendants, William Waterhouse and Albert Waterhouse, are the duly qualified and acting Executors under the Will and of the Estate of Henry Waterhouse, deceased, late of Honolulu, and are residing in said Honolulu.

That heretofore, to wit, on the 21st day of July, 1903, said Clinton J. Hutchins, Trustee, as principal, with said Henry Waterhouse and said Arthur B. Wood as sureties, executed his certain writing obligatory whereby the said principal an the said sureties, their
1233 successors and administrators, jointly and severally, became bound unto the William W. Bierce, Limited, plaintiff herein, its successor or successors and assigns, in the sum of Thirty thousand dollars, the condition of said writing obligatory being that whereas the said William W. Bierce, Limited, had begun in the Circuit Court of the Third Circuit of the Territory of Hawaii a replevin action against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Complaint filed in said action, of the alleged value of Fifteen thousand dollars, and requested that said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his Deputies and turned over to said plaintiff, and whereas said defendant, being desirous of having said property returned and had required the return thereof from said High Sheriff and his deputies; Therefore if the said property and all thereof should be well and truly delivered to the said plaintiff, if such delivery should be adjudged, and payment to the said plaintiff should be well and truly made of such sum as might, for any cause be recovered against the defendant, then said obligation should be null and void, otherwise to be and remain in full force and effect; That a copy of said writing obligatory is hereto attached, marked "Exhibit "A" and made a part hereof.

That on or about December 17th, 1903, the said cause between plaintiff and the said Clinton J. Hutchins, Trustee, was by stipulation in writing and order of court duly transferred from the Circuit Court of the Third Circuit to the Circuit Court of the First Circuit of the Territory of Hawaii, and on March 19th, 1904, judgment was duly rendered against said Clinton J. Hutchins, Trustee, and in favor of the plaintiff for the return of the aforesaid property, or in case said property was not returned, for the sum of Twenty-
1234 two thousand dollars, which was the value of said property as found by the Court; that afterwards, on good cause being shown by the plaintiff, execution was duly issued on said judgment, and was duly returned by the proper officer wholly unsatisfied, whereupon the obligation of said writing obligatory was violated and forfeited and a right of action thereon accrued in plaintiff's favor.

That the aforesaid Henry Waterhouse, surety on said writing obligatory, died at Honolulu on or about the 20th day of February, 1904, leaving a will in which he appointed the defendants William Waterhouse and Albert Waterhouse as his Executors and that said will was admitted to Probate by the Honorable George D. Gear,

Second Judge of the Circuit Court of the First Circuit and said executors duly appointed by said Judge on or about the 4th day of April, 1904.

And the said plaintiff further says that on or about the 6th day of September 1904 and within the time required by law, the said plaintiff duly presented its claim against the Estate of Henry Waterhouse, deceased, to the defendants William Waterhouse and Albert Waterhouse, and that said claim was on or about the 26th day of September 1904 rejected by said defendants; that on or about the 30th day of September 1904, plaintiff again presented its claim against said Estate of Henry Waterhouse, deceased, to said defendants, said claim being so presented the second time in order that certain formal inaccuracies in the statement of the first claim might be corrected, but that up to the present time said defendants have failed, neglected and refused to allow or reject the said claim.

And plaintiff further says that six months have elapsed since the probate of the Will of the aforesaid Henry Waterhouse and the appointment of said defendants as his executors, and that plaintiff is now entitled to sue said defendants under the laws of this Territory.

That no part of the judgment of Twenty-two thousand 1235 Dollars obtained by the plaintiff against the said Clinton

Hutchins, Trustee, has been paid by said Clinton J. Hutchins, Trustee, or his sureties said Henry Waterhouse and said Arthur B. Wood or by any person and that no part of the property involved in said replevin suit and ordered returned by said judgment has been returned to this plaintiff.

That the plaintiff has been damaged in the premises in the sum of Twenty-two thousand dollars, together with interest thereon from the 19th day of March, 1904.

Wherefore plaintiff prays the process of this court to summon the said defendants to appear and answer this complaint at the January 1905 Term of this Honorable Court, and that plaintiff may have judgment against defendants for the sum of \$22,000 together with interest thereon from March 19th, 1904, its costs and attorneys' commissions.

WILLIAM W. BIERCE, LIMITED,

By Its Attorneys, KINNEY, McCLANAHAN &
COOPER.

C. A. GALBRAITH,

Of Counsel.

HONOLULU, OAHU,

Territory of Hawaii, ss:

S. H. Derby being first duly sworn on oath deposes and says:

That he is the duly authorized and acting attorney in fact of the above named plaintiff William W. Bierce Limited in this jurisdiction; that said William W. Bierce, Limited, is a corporation duly organized and existing under the laws of the State of Louisiana and has no other representative than affiant in this jurisdiction except its attorneys at law; that he had read the foregoing complaint and

knows the contents thereof and that the matters and things therein alleged and set forth are true.

S. H. DERBY.

Subscribed and sworn to before me this 11th day of October, A. D. 1904.

[SEAL.]

GUSSIE H. CLARK,
Notary Public, First Judicial Circuit.

1236

EXHIBIT "A."

Circuit Court, Third Circuit, Territory of Hawaii.

Stamps.

WILLIAM W. BIERCE, LTD., a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee.

Replevin.

Return Bond.

Know all men by these presents: That we Clinton J. Hutchins, as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bound unto William W. Bierce Company Ltd. its successor or successors and assigns in the sum of Thirty Thousand (30,000) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors herein and administrators jointly and severally by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies and turned over to said plaintiff, and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

1237 Now therefore if the said property and all thereof shall be well and truly delivered the said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July A. D. 1903.

(Sg.)
(Sg.)
(Sg.)

CLINTON J. HUTCHINS, *Trustee.*
HENRY WATERHOUSE, *Surety.*
ARTHUR B. WOOD, *Surety.*

The foregoing Bond is approved as to its sufficiency of sureties.
Dated, July 21, 1903.

(Sg.)

A. M. BROWN,
High Sheriff.

Endorsed: Law No. —. Circuit Court, First Circuit, Territory of Hawaii. William W. Bierce, Ltd., Plaintiff, vs. Clinton J. Hutchins, Trustee, et al., Defendants. Complaint. — — —, Judge. Rec'd \$37. Filed October 12, 1904, at 9:50 a. m. J. A. Thompson, Clerk. Kinney, McClanahan & Cooper, 302-305 Judd Bldg., Honolulu, Attorneys for — — —. (Office No. —.)

1238 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January (1905) Term.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Plea in Abatement.

Now come William Waterhouse and Albert Waterhouse, Executors of the Will of Henry Waterhouse, deceased, defendants in the above entitled action, and pray judgment of the plaintiff's bill of complaint filed in said action, and that the same be dismissed because they say that that certain Action in Replevin, commenced in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, wherein William W. Bierce, Limited, is plaintiff, and Clinton J. Hutchins, Trustee, is defendant, to recover from said defendant certain property in the complaint in said action mentioned, and wherein the return bond on which said plaintiff seeks to recover in this action is alleged to have been given, was on or about the 21st day of March 1902, appealed to the Supreme Court of the Territory of Hawaii, and that said appeal has been perfected and has not been dismissed and is at the present time pending and undetermined before said Supreme Court.

That the obligation of said return bond alleged to have been given and made by said defendant Clinton J. Hutchins, Trustee, as principal, and Henry Waterhouse (whose executors said William Waterhouse and Albert Waterhouse are defendants herein), and Arthur B. Wood, also defendant herein, are sureties, is only that if the said property and all thereof shall be well and truly delivered the said plaintiff, if said delivery be adjudged by said court, and pay such sums as may be recovered against said defendant Clinton J. Hutchins, Trustee, by judgment in said action, then this obligation to be void, otherwise to remain in full force and effect; that the said William W. Bierce, Limited,

plaintiff in this action is not entitled to maintain this action on said return bond as alleged in said complaint in this action or at all, pending the aforesaid appeal to said Supreme Court, and that said action on said bond cannot be maintained until final judgment in that certain action wherein said return bond is alleged to have been given and made; and this the defendants are ready to verify.

Wherefore, the said defendants pray judgment of this Honorable Court whether they should be compelled to make any other or further answer to said complaint and that these defendants further pray that they be hence dismissed with their costs.

WILLIAM WATERHOUSE AND
ALBERT WATERHOUSE.

*Executors under the Will and of the Estate
of Henry Waterhouse, Deceased, Defendants,
By SMITH & LEWIS,
Their Attorneys.*

TERRITORY OF HAWAII,
Island of Oahu, ss:

Albert Waterhouse, being first duly sworn, deposes and says that he is one of the Executors of the last Will of Henry Waterhouse, deceased; and one of the defendants in the above entitled action; that he has read the foregoing Plea to the Complaint
1240 of William W. Bierce, Limited, plaintiff in the above entitled action, and that all the matters and things alleged in said Plea are true.

ALBERT WATERHOUSE.

Subscribed and sworn to before me this 11th day of November
1904.

WM. J. FORBES, [SEAL.]
*Notary Public, First Judicial Circuit, Circuit,
Territory of Hawaii.*

Endorsed: L. 6023 Circuit Court First Judicial Circuit, Territory of Hawaii. January (1905) Term. William W. Bierce, Limited, Plaintiff vs. Clinton J. Hutchins, Trustee, Arthur B. Wood; and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, Defendants. Plea in Abatement of William Waterhouse and Albert Waterhouse Executors. Filed November 11, 1904, at 3:49 o'clock P. M. J. A. Thompson, Clerk. Service admitted. Kinney, McClanahan & Cooper, Att'ys, for Def's Plaintiff. Smith & Lewis Attorneys at Law Judd Building Honolulu T. H.

1241 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, September Term, A. D. 1904.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

VS

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Amended Complaint.

To the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Circuit:

Comes now the said plaintiff, William W. Bierce Limited, & leave of Court having been first had & obtained, hereby pre-

P. D. K. Jr. sents its Amended Complaint and for cause of action against the said defendants, says:

That the plaintiff is now and at all the times hereinafter mentioned was a corporation duly organized under the laws of the State of Louisiana, and duly qualified to bring and maintain suit in this Territory; that the defendant Clinton J. Hutchins Trustee is a resident of Honolulu, Island of Oahu, Territory of Hawaii; that the defendant Arthur B. Wood is also a resident of said Honolulu, and that the defendants William Waterhouse and Albert Waterhouse, are the duly qualified and acting executors under the will and of the estate of Henry Waterhouse, deceased, late of Honolulu, and are residing in said Honolulu.

That heretofore, to-wit, on the 21st day of July, 1903, 1242 said Clinton J. Hutchins, Trustee as principal and said Henry Waterhouse and Arthur B. Wood as sureties executed and delivered and thereafter, to-wit, on the 1st day of August, A. D. 1903, caused to be filed in the Circuit Court of the Third Circuit of the Territory of Hawaii their certain writing obligatory whereby the said principal and the said sureties, their successors and administrators, jointly and severally, became bound unto the William W. Bierce Limited plaintiff herein, its successor or successors and assigns, in the sum of Thirty Thousand Dollars, the condition of said writing obligatory being that whereas the said William W. Bierce Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii a replevin action against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the complaint filed in said action, of the alleged value of Fifteen Thousand Dollars, and requested that said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies and turned over to said plaintiff, and whereas said defendant, being desirous of having said property returned and had required the return thereof from said High Sheriff and his deputies; therefore if the said property and all

thereof should be well and truly delivered to the said plaintiff if such delivery should be adjudged, and payment to the said plaintiff should be well and truly made of such sum as might, for any cause be recovered against the defendant, then said obligation should be null and void, otherwise to be and remain in full force and effect; that a copy of said writing obligatory is hereto attached, marked "Exhibit A" and made a part hereof; that said property referred to in said bond was upon the execution of said bond duly delivered to the defendant Clinton J. Hutchins, Trustee, who at once resumed possession of the same.

That on or about December 17th, 1903, the said cause 1243 between plaintiff and the said Clinton J. Hutchins, Trustee, was by stipulation of the parties in writing and order of Court duly transferred from the Circuit Court of the Third Circuit to the Circuit Court of the First Circuit of the Territory of Hawaii; that thereafter a trial was duly had of said cause in the month of March, A. D. 1903, at which trial it appeared from the evidence that the property in question therein was of the value of \$22,000.00; that plaintiff was thereupon, on motion duly made for that purpose, allowed to amend its complaint in said action by alleging that the value of the property in question was \$22,000.00; that on March 19th, 1904 judgment was duly rendered against said Clinton J. Hutchins, Trustee, and in favor of the plaintiff for the return of the aforesaid property, or in case said property was not returned, for the sum of Twenty-two Thousand Dollars, which was the value of said property as found by the Court; that afterwards, on good cause being shown by the plaintiff, execution was duly issued on said judgment, and was duly returned by the proper officer wholly unsatisfied, whereupon the obligation of said writing obligatory was violated and forfeited and a right of action thereon accrued in plaintiff's favor.

That the aforesaid Henry Waterhouse, surety on said writing obligatory, died at Honolulu on or about the 20th day of February, 1904, leaving a will in which he appointed the defendants William Waterhouse and Albert Waterhouse as his executors and that said Will was admitted to Probate by the Honorable George D. Gear, Second Judge of the Circuit Court of the First Circuit and said executors duly appointed by said Judge on or about the 4th day of April, 1904.

And the said plaintiff further says that on or about the 6th day of September, 1904 and within the time required by law, the said plaintiff duly presented its claim against the Estate of Henry Waterhouse, deceased, to the defendants William Waterhouse 1244 and Albert Waterhouse, and that said claim was on or about the 26th day of September, 1904, rejected by said defendants; that on or about the 30th day of September, 1904, plaintiff again presented its claim against said Estate of Henry Waterhouse, deceased, to said defendants, said claim being so presented the second time in order that certain formal inaccuracies in the statement of the first claim might be corrected, but that up to the present time

said defendants have failed, neglected and refused to allow or reject the said claim.

And plaintiff further says that six months have elapsed since the Probate of the Will of the aforesaid Henry Waterhouse and the appointment of said defendants as his executors, and that plaintiff is now entitled to sue said defendants under the laws of this Territory.

That no part of the judgment of Twenty-two Thousand Dollars obtained by the plaintiff against the said Clinton J. Hutchins, has been paid by said Clinton J. Hutchins, Trustee, or his sureties said Henry Waterhouse and said Arthur B. Wood, or by any person, and that no part of the property involved in said replevin suit and ordered returned by said judgment has been returned to this plaintiff.

That the plaintiff has been damaged in the premises in the sum of Twenty-two Thousand Dollars, together with interest thereon from the 19th day of March, 1904.

Wherefore plaintiff prays the process of this Court to summon the said defendants to appear and answer this complaint at the January 1905 Term of this Honorable Court, and that plaintiff may have judgment against defendants for the sum of \$22,000.00 together with interest thereon from March 19th, 1904, its costs and attorney's commissions.

WILLIAM W. BIERCE, LIMITED,

By its Attorneys, KINNEY McCLANAHAN &
COOPER.

C. A. GALBRAITH,

Of Counsel.

Plaintiff moves to amend the amended complaint as follows: The words on the first line of page 5, to wit "Twenty Two Thousand Dollars," be stricken out and the words, "Twenty Eight Thousand One Hundred and Fifty Six Dollars and Seventy Four cents" be inserted in lieu thereof. The court ordered the amendment to be made accordingly. Plaintiff moves that the following words in the lines 1 and 2 page 5 of the said amended complaint to wit: "together with interest thereon from the 19th day of March 1904," be stricken out. The court so orders. Also, plaintiff moves that the figures \$22,000.00 in line 7 of page 5 of the amended complaint be stricken out and the figures \$28,156.74 be inserted in lieu thereof. The court so orders. Also, plaintiff moves that the words in line 7 on said page 5 to wit: "together with interest thereon from March 19th 1904 be stricken out. The court so orders.

The court further orders that each and all of said amendments be made upon the face of the said amended complaint in accordance with the foregoing orders.

By order of the Court.

JOB BATCHELOR, *Clerk.*

May 12th, 1908.

1245 HONOLULU, OAHU,
Territory of Hawaii, ss:

S. H. Derby being first duly sworn on oath deposes and says:

That he is the duly authorized and acting attorney in fact of the above named plaintiff William W. Bierce Limited in this jurisdiction; that said William W. Bierce Limited, is a corporation duly organized and existing under the laws of the State of Louisiana and has no other representative than affiant in this jurisdiction except its attorneys at law; that he has read the foregoing complaint and knows the contents thereof, and that the matters and things therein alleged and set forth are true.

S. H. DERBY.

Subscribed and sworn to before me this 22nd day of December,
A. D. 1904.

(Sig.)

WM. J. FORBES, [SEAL.]
Notary Public, First Judicial Circuit.

1246

EXHIBIT "A."

Circuit Court, Third Circuit, Territory of Hawaii.

Stamps.

WILLIAM W. BIERCE, LTD., a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee,

Replevin.

Return Bond.

Know all men by these presents, that we, Clinton J. Hutchins Trustee, as principal and Henry Waterhouse and Arthur B. Wood, as sureties are held and firmly bound unto William W. Bierce Company, Ltd., its successor or successors and assigns in the sum of Thirty Thousand (\$30,000.) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors herein and administrators jointly and severally by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000, as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his

1247 deputies and turned over to said plaintiff, and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies:

Now therefore if the said property and all thereof shall be well and truly delivered the said plaintiff, if such delivery be adjudged, and payment of said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Sg.)

CLINTON J. HUTCHINS, *Trustee*.

(Sg.)

HENRY WATERHOUSE, *Surety*.

(Sg.)

ARTHUR B. WOOD, *Surety*.

The foregoing bond is approved as to its sufficiency of sureties.

(Sg.)

A. M. BROWN,

High Sheriff.

Dated July 21, 1903.

Endorsed: 1370 L. 5782. Circuit Court Third Circuit Territory of Hawaii. William W. Bierce, Ltd., a corporation, plaintiff, vs. Clinton J. Hutchins, Trustee, Defendant. Return Bond. Filed Aug. 1st, 1903, 7 o'clock a. m. S'g'd. J. P. Curtis, Clerk.

Law No. —. Circuit Court First Circuit Territory of Hawaii. William W. Bierce, Ltd. Plaintiff vs. Clinton J. Hutchins, Trustee, et al., Defendants. Amended Complaint. Hon. J. T. De Bolt, Judge. Filed Dec. 22d, 1904, at 2:50 P. M. P. D. Kellett, Jr., Clerk. Kinney, McClanahan & Cooper C. A. Galbraith 303-305 Judd Bldg. Honolulu. Attorneys for Plaintiffs. (Office No. —.)

1248 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January (1905) Term.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Demurrer of Executors to Amended Complaint.

Now comes William Waterhouse and Albert Waterhouse, Executors of the last Will of Henry Waterhouse, deceased, defendants in the above entitled action, and demur to plaintiff's bill of complaint on file herein, and for grounds of complaint aver as follows:

I.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this, that it does not

appear therein neither can it be ascertained therefrom wherein and whereby said plaintiff is entitled to maintain said action against said defendants William Waterhouse and Albert Waterhouse as such executors.

II.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse
1249 and Albert Waterhouse, Executors as aforesaid, in this, that it does not appear therein, neither can it be ascertained therefrom, whether or not said action commenced by said plaintiff against said defendant Clinton J. Hutchins, Trustee, wherein judgment is alleged to have been rendered against said defendant Clinton J. Hutchins, Trustee has been appealed to the Supreme Court of the Territory of Hawaii, or that said judgment is a final judgment.

III.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this, that no cause of action lies against said defendants William Waterhouse and Albert Waterhouse as such Executors, or against the Estate of said Henry Waterhouse, deceased.

IV.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse and Albert Waterhouse, Executors as aforesaid, in this, that it appears from said complaint that judgment was rendered against said defendant Clinton J. Hutchins, Trustee, in the sum of Twenty-two Thousand Dollars (\$22,000.) which, it is alleged, was the value of the said property found by the Court, while it appears in the return bond attached to said complaint, and made a part thereof, that the value of the property specifically set forth in the bill of complaint filed in said suit and the affidavit filed therein, is the sum of Fifteen Thousand Dollars (\$15,000.00).

V.

That said complaint does not state facts sufficient to constitute a cause of action against said defendants William Waterhouse
1250 and Albert Waterhouse, Executors as aforesaid, in this, that it appears from said complaint that said action in which said bond was given was commenced before the Circuit Court of the Third Circuit, Territory of Hawaii; that said action was thereafter transferred from the said Circuit Court of the Third Circuit to the Circuit Court of the First Circuit, Territory of Hawaii; that it does not appear therein, neither can it be ascertained therefrom that the said Henry Waterhouse or his said Executors consented to said transfer.

VI.

That said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, said defendants William Waterhouse and Albert Waterhouse, Executors of the last Will of Henry Waterhouse deceased, pray judgment that plaintiff take nothing by this action, and that they, the said Executors, be hence dismissed with their costs.

SMITH & LEWIS,

Attorneys for said Defendants, William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Endorsed: Law 6023. Circuit Court First Circuit Territory of Hawaii. January (1905) Term. William W. Bierce, Ltd. vs. Clinton J. Hutchins, Tr. A. B. Wood; Wm. Waterhouse & A. Waterhouse, Executors. Demurrer of Executors to Amended Complaint. Filed December 29, 1904, at 1 P. M. J. A. Thompson, Clerk. Smith & Lewis Attorneys at Law Judd Bldg. Honolulu, T. H.

Due service of copy of the within demurrer is hereby admitted this 29th day of December 1904. Kinney, McClanahan & Cooper C. A. Galbraith, Attorneys for pl'ff.

1251 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, September Term, A. D. 1904.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Answer of William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Now come William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, and answering plaintiff's amended complaint on file herein deny the truth of each and every allegation in said amended complaint contained.

Wherefore said defendants pray to be hence dismissed with their costs.

Dated, Honolulu, November 3, 1905.

WILLIAM WATERHOUSE AND
ALBERT WATERHOUSE,

Executors,

By SMITH & LEWIS,

Their Attorneys.

Endorsed: L. 6023. Circuit Court, First Circuit, Territory of Hawaii. September Term, A. D. 1904. William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee; Arthur B. Wood and William Waterhouse & Albert Waterhouse, Executors. Answer of William Waterhouse and Albert Waterhouse, Executors. Filed Nov. 3, 1905. George Lucas, Clerk. Smith & Lewis, Attorneys at Law, Judd Bldg. Honolulu, T. H. Due service by copy of the within answer is hereby admitted this 3rd day of November, 1905. Kinney, McClanahan & Cooper. E. B. M. Attorneys for Plaintiff.

1252 In the Circuit Court of the First Circuit, Territory of Hawaii,
January Term, 1906.

L. 6023.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, et al., Defendants.

Assumpsit.

Motion for Continuance.

Now comes William W. Bierce, Limited, plaintiff herein, by its attorney A. G. M. Robertson, and moves the Court here that the above entitled cause be continued till the next term of this Court.

This motion is based on the record herein, the affidavit of A. G. M. Robertson hereto attached and made part hereof; and also a copy of the petition for a writ of mandamus filed in the Supreme Court of the United States in the case of William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee, and the petitioner's brief in support thereof, filed herewith.

Dated, Honolulu, January 3, 1906.

WILLIAM W. BIERCE,
LIMITED,

By its Attorney, A. G. M. ROBERTSON.

1253 In the Circuit Court of the First Circuit, Territory of Hawaii,
January Term, 1905.

L. 6023.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, et al., Defendants.

Assumpsit.

Affidavit of A. G. M. Robertson.

TERRITORY OF HAWAII,
Island of Oahu, ss:

A. G. M. Robertson, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled cause;

that the said action was instituted to recover damages for breach of condition in a certain redelivery bond given in an action of replevin entitled "William W. Bierce, Limited vs. Clinton J. Hutchins, Trustee," heretofore tried in the above entitled court and reported in the decisions of the Supreme Court on exceptions therein taken in 16 Haw. 418, 717; that proceedings were promptly taken to have reviewed the said decisions by the Supreme Court of the United States, and said proceedings are now pending in the last mentioned Court, and as deponent is informed and believes, the source of his information being Henry W. Prouty, Esq., of Chicago, Ill., general counsel for the petitioner, that every proper endeavor is being made to secure an early hearing and determination thereof; that

1254 there is no need or occasion why the above entitled cause should be tried at the present term of this court, or pending the final determination of the proceedings referred to, because in the event of the judgment for defendant in said action of replevin being affirmed by the United States Supreme Court, this present action would be immediately discontinued, whereas if said Court should affirm the judgment heretofore rendered in and by the above entitled Court, in favor of the plaintiff, the plaintiff would be entitled to the protection of this present action upon said bond; that a trial of this action at this present term would necessitate further appeals to the local Supreme Court and to the Supreme Court of the United States, and entail the attendant expenses of such proceedings upon the government and the parties litigant unnecessarily.

A. G. M. ROBERTSON.

Subscribed and sworn to before me this 3rd day of January, A. D. 1906.

JOB BATCHELOR,
Clerk Circuit Court, First Circuit.

Endorsed: L. 6023. Circuit Court, First Circuit, January Term, 1906. William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee, et al. Motion for Continuance. Filed January 3rd, 1906, at 3:40 P. M. Job Batchelor, Clerk. A. G. M. Robertson, Att'y for Pl'tff.

1255 In the Circuit Court of the First Circuit, Territory of Hawaii,
April Term, 1906.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, et als., Defendants.

Assumpsit.

Motion for Continuance.

Now comes William W. Bierce, Limited, plaintiff herein, by its attorney A. G. M. Robertson, and moves the Court here that

the above entitled cause be continued till the next term of this Court.

This motion is based on the record herein; a copy of the petition for a writ of mandamus filed in the Supreme Court of the United States in the case of William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee, and the petitioner's brief in support thereof heretofore filed in this cause; the affidavit of A. G. M. Robertson hereto attached; and certified copies of a motion for a writ of supersedeas, affidavit in support thereof, and of the order of the Supreme Court of the United States, entered thereon, in the case of William W. Bierce, Limited, appellant, vs. Clinton J. Hutchins, Trustee, No. 607, October Term 1905, as the same remain upon the files and records of said Supreme Court filed herewith; also upon the certified copy of the order of the Supreme Court of the United States made and entered on the 4th day of December, 1905, allowing

1256 the appeal in said case of William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee, and the bond of said appellant filed pursuant to said order, which constitute part of the records of the Supreme Court of this Territory in said cause, and which this movant asks leave to offer in evidence upon the hearing of this motion, all of which are offered and referred to in support of this motion and made part hereof.

Dated, Honolulu, April 4th, 1906.

WILLIAM W. BIERCE,
LIMITED.

By its Attorney, A. G. M. ROBERTSON.

1257

Affidavit.

TERRITORY OF HAWAII,
Island and County of Oahu, ss:

A. G. M. Robertson, being first duly sworn, deposes and says that he is the attorney for William W. Bierce, Limited, plaintiff in the above entitled cause; that the above entitled action was instituted to recover damages for breach of condition in a certain redelivery bond given by the defendants in an action of replevin entitled "William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee," heretofore tried in this Court and reported in the decisions of the Supreme Court of this Territory on exceptions taken in the trial thereof in 16 Haw. 418 and 717; that proceedings were promptly taken by the plaintiff to have the said decisions reviewed by the Supreme Court of the United States; that plaintiff's appeal in said cause has been duly allowed and a supersedeas issued by the Supreme Court of the United States, and the judgment therein has been superseded accordingly; that a complete transcript of the record in said cause has been completed, printed and filed in said Supreme Court, and the cause is in said Court now pending; and deponent is informed and believes that every proper endeavor is being made to secure an early hearing and determination thereof; that there is no need or occasion why the above entitled cause should be tried

at the present term of this Court, or pending the final determination of the proceedings referred to because in the event of the judgment for defendant in said action of replevin being affirmed by the United States Supreme Court, this present action would be immediately discontinued, whereas if said court should affirm the judgment heretofore rendered in and by the above entitled Court in favor of the plaintiff, the plaintiff would be entitled to the 1258 protection of this present action upon said redelivery bond; that plaintiff was compelled for its own protection to institute this present action against the executors of the Estate of Henry Waterhouse, deceased, before the final determination of the appeal in said action of replevin by reason of the statute of limitations of this Territory in regard to the filing of claims against the estate of deceased persons; that a trial of this action at this present term of this Court would necessitate further appeals to the Supreme Court of this Territory and perhaps to the Supreme Court of the United States, and so entail the attendant expenses of such proceedings upon the government and the parties litigant unnecessarily, and otherwise do injustice to the plaintiff.

A. G. M. ROBERTSON.

Subscribed and sworn to before me this 4th day of April, A. D. 1906.

WM. R. SIMS, *Clerk*.

Endorsed: Circuit Court, First Circuit. April Term, 1906. William W. Bierce, Ltd., v. Clinton J. Hutchins, Trustee, et als. Motion for Continuance. Filed Apr. 4th, 1906. Sims, Clerk. A. G. M. Robertson, Att'y for Pl'tff.

1259 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January, 1905, Term.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Affidavit in Opposition to Motion for Continuance.

TERRITORY OF HAWAII,

Island of Oahu, ss:

A. Lewis, Jr., being first duly sworn deposes and says: That he is a member of the firm of Smith & Lewis, Attorneys for Defendants Arthur B. Wood; and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, Defendants in the above entitled action; that proceedings have not been promptly taken by Plaintiff in the replevin case of William W. Bierce, Limited, vs. Clinton J. Hutchins No. 5782;

that said action is being unnecessarily delayed and prejudicial to the rights of Defendants Arthur B. Wood; and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased; that final judgment was rendered in the Supreme Court of the Territory of Hawaii in said replevin suit on May 6th, 1905; that the first papers filed in the Supreme Court of the United States in said replevin suit were entered February 28th, 1906; that no papers showing that any supersedeas

W. R. S. proceedings had been taken to obtain a writ of [error]* in said United States Supreme Court in said replevin suit were filed in the Territorial Supreme Court until March 23rd 1906. That said Defendants Arthur B. Wood; and William Waterhouse and Albert Waterhouse, executors under the Will and of the Estate of Henry Waterhouse, deceased, as sureties on the replevin bond are entitled to immediate trial and a determination of any possible claims under said replevin bond given July 21st 1903.

A. LEWIS, JR.

Subscribed and sworn to before me this 6th day of April 1906.

GEORGE LUCAS,

*Clerk of the Circuit Court of the First Judicial
Circuit, Territory of Hawaii.*

Endorsed: Circuit Court, First Circuit, Territory of Hawaii. January 1905 Term. William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee; Arthur B. Wood; William Waterhouse and Albert Waterhouse, Executors, &c. Affidavit in opposition to Motion for Continuance. Filed April 6, 1906, at 9:20 a. m. George Lucas, Clerk. Smith & Lewis, Attorneys at Law. Judd Building, Honolulu, T. H.

1261 In the Circuit Court of the First Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

v.

CLINTON J. HUTCHINS, Trustee; A. B. WOOD, WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will of Henry Waterhouse, Deceased, Defendants.

Notice of Motion to Set Cause for Trial.

To William W. Bierce, Limited, Plaintiff in the above entitled action, and to A. G. M. Robertson, Esquire, its Attorney:

You, and each of you, will please take notice that on Thursday, the 6th day of September, 1906, at 9:30 A. M. of said day, the Defendants in the above entitled action will move the above entitled Court for an order setting the above entitled case for trial. Said

[* Word enclosed in brackets erased in copy.]

motion will be based upon this motion and the pleadings, records and files of said action.

SMITH & LEWIS,
Attorneys for A. B. Wood, William Waterhouse and Albert Waterhouse, Executors under the Will of Henry Waterhouse, Deceased.

CASTLE & WITHINGTON,
Attorneys for Clinton J. Hutchins, Trustee.

Receipt of copy of within Notice is hereby admitted this 4th day of September, 1906.

A. G. M. ROBERTSON,
Attorney for Plaintiff.

Endorsed: L. 6023. Circuit Court, First Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff, v. Clinton J. Hutchins, Trustee; A. B. Wood, William Waterhouse, Albert Waterhouse, Executors under the Will of Henry Waterhouse, deceased. Defendants. Notice of Motion to set cause for Trial. Dated September 4, 1906. Filed Sept. 4, 1906, 4 P. M. M. T. Simonton, Clerk. Smith & Lewis, Attorneys at Law, Judd Building, Honolulu, T. H.

1262 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Instructions Requested by the Plaintiff.

1263 I. The Court instructs the jury that under the law and the evidence it is the duty of the jury to return a verdict in this case, finding the issues for the plaintiff and assessing the Plaintiff's damages at the sum of Twenty-eight Thousand One Hundred and fifty-six dollars and seventy-four cents, (\$28,156.74).
Refused. J. T. D.

If the Court refuses the above Instruction then plaintiff requests the following instructions:

1264 2.

GENTLEMEN OF THE JURY:

you

The Court instructs [the jury]* that the following facts are undisputed in the evidence on this trial, namely:

[* Words enclosed in brackets erased in copy.]

That Clinton J. Hutchins, Trustee, as Principal, and Henry Waterhouse and Arthur B. Wood, as sureties, executed to the Plaintiff, William W. Bierce, Limited, on July 21st, 1903, the so-called return or re-delivery bond mentioned in the evidence; That said bond was executed and delivered to the High Sheriff and filed by him in the action of replevin mentioned in the evidence in which it was entitled, and that the conditions thereof were that if the property in controversy in said Replevin suit, and all thereof, should be well and truly delivered to the Plaintiff therein, said William W. Bierce, Limited, if such delivery should be adjudged, and payment to said plaintiff should be well and truly made of such sum as might for any cause be recovered against the defendant, Clinton J. Hutchins, Trustee, then said obligation should be null and void, otherwise to be and remain in full force and effect; also, that thereafter, on the 19th day of March, 1904, William W. Bierce, Limited, the plaintiff in said action of Replevin, recovered judgment therein in this court against the defendant therein, Clinton J. Hutchins, Trustee, adjudging that he forthwith return into the possession of the Plaintiff the railroad rails, locomotives, cars, spikes, joints and other railway material constituting all of the property in controversy, and further adjudging that said William W. Bierce, Limited, have and recover from said Clinton J. Hutchins, Trustee, the sum of Ten Hundred and Forty-five Dollars (\$1045) as damages for the detention of said property from the 1st day of June, 1903, until, the date of said judgment, together with the costs of said action, taxed at the sum of Fifty Dollars and fifty cents (\$50.50); also adjudging that on failure of said Clinton J. Hutchins, Trustee, to forthwith make such return of said property into the possession of said Plaintiff, that said Plaintiff, William W. Bierce, Limited, have and recover from said defendant, Clinton J. Hutchins, Trustee, the value of said property, found and adjudged to be Twenty-two Thousand Dollars (\$22,000.), together with the aforesaid sum of Ten Hundred and Forty-five Dollars (\$1045.), damages for detention, and costs taxed at Fifty Dollars and fifty cents (\$50.50); also that thereafter, on April 15th, 1904, the special execution introduced in evidence was issued on said judgment, which was, thereafter, on the 23rd day of May, 1904, returned into the court by the Sheriff, unsatisfied; also, that thereafter, on exceptions taken and prosecuted by said Clinton J. Hutchins, Trustee, the Supreme Court of the Territory of Hawaii entered judgment in said action of Replevin, on the 6th day of May, 1905, reversing the said judgment in this court therein and sustaining the exceptions of the defendant, Clinton J. Hutchins, Trustee, in so far as they raised the question of election, and remanding said suit to this court with directions to enter judgment for the defendant therein, with costs; also, that thereafter, on the 8th day of April, 1907, on an appeal prosecuted from said judgment of said Supreme Court by said William W. Bierce, Limited, to the Supreme Court of the United States, the latter court entered its judgment therein, reversing said judgment of the Supreme Court of this Territory and awarding to said William W. Bierce, Limited,

its costs of said appeal, and remanding said cause to the Supreme Court of this Territory for further proceedings, in accordance with the mandate and opinion of the Supreme Court of the United States filed therein; also, that thereafter, on the 27th day of September, 1907, the Supreme Court of the Territory of Hawaii, in accordance with said mandate and opinion, entered judgment 1266 in said action in favor of said William W. Bierce, Limited, and against said Clinton J. Hutchins, Trustee, for the sum of Seven Hundred and Forty-eight Dollars and Fifty-seven cents (\$748.57) costs, which judgment remains unpaid and unsatisfied; also, that thereafter, in accordance with said mandate and opinion of the Supreme Court of the United States, the Supreme Court of the Territory of Hawaii made and entered an order in said action of Replevin over-ruling the exceptions of said defendant, Clinton J. Hutchins, Trustee, a notice and certified copy of which said order constituting the mandate of said Supreme Court has been filed in this court in said action of Replevin, the effect of which is to leave the said judgment of this court in full force and effect, the same as if no judgment of reversal thereof had ever been rendered by the Supreme Court of this Territory; also, that on or about the 18th day of April, 1904, the defendant, Clinton J. Hutchins, Trustee, paid to the plaintiff, William W. Bierce, Limited, the amount of the damages for detention, Ten Hundred and Forty-five Dollars (\$1045.) and costs taxed at Fifty Dollars and Fifty cents (\$50.50) recovered by the said judgment of this court, together with interest on the value of the property in controversy therein, adjudged to be twenty-two Thousand Dollars (\$22,000.), from the date of said judgment, March 1904, until the date of the issuing of said execution, April 15th, 1904, the three items so paid amounting in all to the sum of Eleven Hundred and Ninety eight Dollars and Twenty-five cents (\$1198.25); aside from which nothing has been paid on said judgment to the Plaintiff, William W. Bierce, Limited, and the sum of Twenty-two Thousand Dollars (\$22,000.00) therein adjudged to be the value of the property in question, has not, nor has any part thereof, nor interest on said sum since the 15th 1267 day of April, 1904, been paid to the Plaintiff, William W. Bierce, Limited; also, that on or about the 20th day of February, 1904, Henry Waterhouse, one of the sureties on said re-delivery bond, died at Honolulu, leaving a will, in which he appointed the defendants, William Waterhouse and Albert Waterhouse as executors thereof, and that said Will was admitted to probate and letters testamentary thereon were duly granted and issued to said executors by this court on or about the 4th day of April, 1904; also, that thereafter and before the beginning of this action the Plaintiff presented to the said executors its claim against the estate of the said Henry Waterhouse, deceased, for the value of said property as so adjudged to be the sum of Twenty-two Thousand dollars (\$22,000.), with interest thereon, which claim was rejected by said executors. [All these matters which I have mentioned are undisputed in the evidence offered on this trial, and all the judgment and other proceedings in the Replevin suit of William W.

Bierce, Limited, against Clinton J. Hutchins, Trustee, which I have mentioned, are matters, the construction and effect of which are questions of law to be passed upon by the court, and not questions of fact for the determination of the jury; and the court, therefore, instructs you that the only question of fact in dispute on this trial, to be passed upon by the jury, is the question whether or not the said Clinton J. Hutchins, Trustee, made an actual tender of the property in question to the Plaintiff, William W. Bierce, Limited, or its attorneys, Messrs. Kinney, McClanahan & Cooper, and unless you believe from the evidence that such actual tender was made in good faith your verdict should be for the plaintiff.]*

Given as modified. J. T. D.

1268

2a.

The principal questions which you will have to consider are, whether the property involved in the replevin case has been returned to the plaintiff; or, if not, whether any actual and sufficient tender of the property was made to the plaintiff by Hutchins.

Given. J. T. D.

1269

3.

The Court instructs the jury that the said Henry Waterhouse by executing the said re-delivery bond, as one of the sureties thereon, in contemplation of law authorized said Clinton J. Hutchins, Trustee, to represent him in said action of Replevin, and said Waterhouse thereby became identified with said Clinton J. Hutchins, Trustee, in interest and claimed in privity with him, so as to be concluded by the proceedings and judgment in said Replevin suit, and that the record of the proceedings and judgment in said suit are also conclusive and binding upon the defendants in this suit, William Waterhouse and Albert Waterhouse, as executors under the will and of the estate of Henry Waterhouse, deceased.

Given. J. T. D.

1270

4.

The court instructs you that by executing said re-delivery bond the obligors therein, including said Henry Waterhouse, admitted that said Clinton J. Hutchins, Trustee, had possession of the property in controversy at the commencement of said Replevin suit, and that said property was taken out of his possession when levied upon and seized by the Sheriff in said suit, and was returned into his possession by the Sheriff upon the execution and delivery of said bonds; and that these admissions cannot be controverted on this trial but are binding and conclusive upon the defendants in this suit, who, in respect to any of the matters so admitted, are estopped from alleging that the contrary is true.

Given. J. T. D.

[* Words and figures enclosed in brackets erased in copy.]

1271

5.

The court instructs the jury, with reference to the written offer to return the property in question, signed by Clinton J. Hutchins, Trustee, and delivered to the Plaintiff's attorneys, bearing date [of]* the 18th day of April, 1904, which has been introduced in evidence by the defendants, that the delivery of this written offer did not alone and by itself constitute a return of the property in question such as to relieve the defendants from liability in this action; and that unless you believe from the evidence that the delivery of said written offer was accompanied by such action on the part of said Clinton J. Hutchins, Trustee, as would enable the Plaintiff or its attorneys to obtain actual possession of the property in question, your verdict should be for the Plaintiff.

Given. J. T. D.

1272

6.

The court instructs the jury that it is a question of fact for the jury to determine from all the facts and circumstances proved on the trial whether or not said Clinton J. Hutchins, Trustee, made a bona fide tender of the property in question to the Plaintiff's attorneys. That in order that an offer such as that introduced in evidence on this trial may constitute such a bona fide tender, it is the law that it must be made in good faith for the purpose and with the intention of putting the party to whom it is made in possession of the property, and that it be not made colorably or for the purpose of laying the foundation for future litigation or defenses, without any intention of actually surrendering the property; and if you believe from the evidence that the offer in question was not made by said Clinton J. Hutchins, Trustee, in good faith for the purpose and with the intention of putting William W. Bierce, Limited in actual possession of the property in question, your verdict should be for the Plaintiff.

Given. J. T. D.

1273

6a.

[In regard to the deed dated June 13, 1903, which is in evidence, by which Clinton J. Hutchins, trustee, conveyed the property in question to the Henry Waterhouse Trust Company, I instruct you that the effect of that document was to transfer the legal title of the property to the Trust Company, and therefore you should consider this fact in connection with the question whether on April 18, 1904, Hutchins was able to make a delivery of the property to the plaintiff, and also as to whether his offer to deliver the property was made in good faith.

[Recording of that deed in the Registry Office gave notice to the plaintiff that the legal title to the property had been transferred by Hutchins to the Henry Waterhouse Trust Company.]*

[Refused. J. T. D.]*

[Written across the face:] Withdrawn.

[* Words enclosed in brackets erased in copy.]

1274

6a.

In regard to the deed dated June 13, 1903, which is in evidence by which Clinton J. Hutchins, Trustee, conveyed the property in question to the Henry Waterhouse Trust Company, I instruct you that the recording of that deed in the Registry Office gave notice to the plaintiff that the legal title to the property had been transferred by Hutchins to the Henry Waterhouse Trust Company; and if you find from the evidence that an actual tender was made of the property by Hutchins, and refused by the plaintiff, you may take into consideration the fact that said conveyance to the Waterhouse Trust Company was on record, in deciding whether plaintiff was justified in refusing the tender.

Given. J. T. D.

1275

7.

The court instructs the jury, with reference to the question whether or not Clinton J. Hutchins, Trustee, returned the property in question to Plaintiff or made an actual tender of the property to the plaintiff, in good faith, that the meaning of the conditions of the re-delivery bond in evidence was not that said Clinton J. Hutchins, Trustee, would allow the Plaintiff, William W. Bierce, Limited, to hunt up the property and get it if it could, but was that he would return it to the Plaintiff, if the Plaintiff succeeded in the action of Replevin, and, while it is true that the property in question was so heavy and bulky as to make it difficult of actual manual delivery, and that the rule as to delivery is less strict as to such property than as to smaller articles, still it was the duty of Clinton J. Hutchins, Trustee, to take such action as would enable the Plaintiff to obtain actual possession of the property, and unless the jury believe from the evidence that he had done this then he had not returned the property to the Plaintiff within the meaning of the statute and the conditions of the bond, and your verdict should be for the Plaintiff.

Given. J. T. D.

1276

8.

The court instructs the jury that the judgment in the Replevin suit imposed upon Clinton J. Hutchins, Trustee, the duty of taking active measures to surrender the property to William W. Bierce, Limited, and not merely the duty of passive submission to a forcible taking of the property by legal process. Under the law [and the evidence]* it was the duty of Clinton J. Hutchins, Trustee, to seek William W. Bierce, Limited, or its representatives, and deliver the property to them, if they would receive it; and if the jury believe from the evidence that he failed to do this such failure constituted a breach of the conditions of the bond, rendering him and his sureties liable, [and your verdict should be for the Plaintiff.]*

Given as modified. J. T. D.

[* Words enclosed in brackets erased in copy.]

1277

9.

The mere writing and sending of a letter to the plaintiff's attorneys that the property was offered and delivered to the plaintiff would not be sufficient. When the judgment was entered in the replevin action in favor of the plaintiff, it became the duty of the defendant Hutchins to redeliver the property to the plaintiff or pay its value. The writing of such a letter would not amount to a delivery unless Hutchins followed it up and supplemented it with active steps to secure to the plaintiff an actual delivery of the property. In this connection you are entitled to take into consideration any evidence which may tend to show whether at the time any such offer was made the property was on land belonging to [the]* Hutchins or on land belonging to other persons and over which he had no control. The plaintiff was not required to go upon the lands of third persons to locate the property and get it if it could.

Given. J. T. D.

1278

10.

An offer or tender to deliver property in order to be effectual must be made in good faith. Whether or not the offer claimed to have been made by Hutchins to return the property in question was made in good faith is for you to decide upon the evidence in this case. In this connection you should consider whether it has been shown that at the time the offer was made Hutchins had authority to return the property. [And the fact that prior to the time the offer to return was made, Hutchins had conveyed the property in question to the Henry Waterhouse Trust Company should be considered by you on this point. And further, the fact that subsequently this property was sold and conveyed by Hutchins to F. B. McStocker or some other person is evidence for you to consider as to whether the offer to return the property was made in good faith or not.]*

Given as modified. J. T. D.

1279

11.

If you find from the evidence that other persons, besides Hutchins and Scott, whose names have not been disclosed on this trial, were interested in the property, and that [Clin J.]* Hutchins was merely their trustee or agent, then Hutchins had no authority to offer to return the property unless he was authorized by such other persons to believe from

do so, and so I instruct you that unless you [are convinced by]* the evidence in this case that such other persons did give Hutchins authority to tender or return the property to the plaintiff and that he did so pursuant to such authority, you must return a verdict for the plaintiff.

Refused. J. T. D.

[* Words enclosed in brackets erased in copy.]

1280

12.

I instruct you that under the judgment which was rendered in the replevin case it became the duty of the defendant to return all of the property in question. The plaintiff was not required to accept a portion of it, nor was the sheriff authorized to accept any portion
believe

of it less than the whole. If, therefore, you [find]* from the evidence that a part only of the property was tendered, or that some of it was so situated that it could not for any reason be delivered

Hutchins

by [the defendant,]* to the plaintiff your verdict must be for the plaintiff.

Given. J. T. D.

1281

13.

I charge you that the return of Deputy Sheriff Nahale to the execution, dated May 23rd, 1904, that he was unable to levy on the property in question, and so returned the execution unsatisfied, is conclusive and binding upon the parties in this action, and no evidence to the contrary can be considered by you in arriving at a verdict in this case. In other words, as the return on the execution, made by the proper officer, shows that the property was not redelivered to the plaintiff, the defendants in this action cannot be permitted to contradict that return by showing, or endeavoring to show that the property was in fact returned.

Refused. J. T. D.

1282

13a.

The Court instructs the jury that the sheriff's return which is indorsed on the special execution introduced in evidence, to the effect that he was unable to levy said writ on the property therein described and he therefore returned the same unsatisfied is a part of the record of this Court in the replevin suit mentioned in the evidence and imports absolute truth, and as such is binding and conclusive upon the parties and their privies, including the defendants in this suit; and that said return is conclusive evidence of the facts therein set forth, [and the jury are instructed to disregard any and all evidence introduced on this trial tending to contradict said return in arriving at their verdict.]*

Refused. [Given as modified.]* J. T. D.

1283

13b.

The Court instructs the jury that the sheriff's return indorsed on the special execution in evidence on this trial is conclusive evidence of the breach of the condition of the redelivery bond mentioned in the evidence by Clinton J. Hutchins, Trustee, and his sureties.

[* Words enclosed in brackets erased in copy.]

such as to entitle the plaintiff to recover from them the value of the property in question.

Refused. J. T. D.

1284

13c.

I charge you that the return of the deputy sheriff which is indorsed on the execution, to the effect that he was unable to levy the writ on the property therein described and that he therefore returned the writ unsatisfied, is a part of the record of this Court in the replevin case, and as such it imports absolute truth and is binding and conclusive on the defendants as to all acts done under and pursuant to the writ while it was in the hands of the deputy sheriff. You are therefore instructed, in considering your verdict, to disregard all testimony that you may find which tends to contradict the return of the deputy sheriff, relating to the time the execution was in his hands.

Given. J. T. D.

1285

13d.

The court instructs the jury that nothing short of an absolute or unconditional tender of the property in question to the plaintiff would relieve the obligors on the bond from liability to the plaintiff for the value of the property, and if you believe from the evidence that the offer of Hutchins to return the property in question to the plaintiff was made upon any conditions or condition, then it would not constitute a defence to this action.

Given. J. T. D.

1286

14.

I instruct you that upon the return of the execution in evidence in this case, the right at once accrued to the plaintiff to maintain its action against the principal and sureties on the redelivery bond for the value of the property as fixed in the judgment in the replevin case, with legal interest thereon and such costs as may have been properly taxed against the defendants in that case, and nothing less than the payment of such value, interest and costs would constitute a defense to this action.

Given. [Refused.]* J. T. D.

1287

15.

If you find from the evidence that a substantial portion of the property in question, at the time the execution was in the hands of the sheriff, was on land belonging to the Kapiolani Estate, that such land was fenced on both sides, and portions of the rails had been taken upon so that the locomotive and cars on the track could not be readily moved off; and if you also find that Scott was prohibited from going upon that land and taking the property off, your verdict must be for the [defendant]* plaintiff, provided you find

[* Words enclosed in brackets erased in copy.]

from the evidence that the plaintiff has in all other respects made out its case [in accordance with all the instructions.]*

Given as modified. J. T. D.

1288

16.

If you find from the evidence that the rails in question or a substantial part of them were lying on lands of third persons, and that
 neither Hutchins nor Scott made [no]* attempt to secure the delivery of them to the sheriff, [your verdict must be for the defendant]*
 then you may consider these facts in arriving at your verdict.

Given. J. T. D.

1289

17.

The court instructs the jury that the fact that the suit was discontinued during the trial, as against the defendants Clinton J. Hutchins, Trustee, and Arthur B. Wood, the two surviving obligors on the re-delivery bond mentioned in the evidence cannot properly be considered by the jury in reaching a verdict in this case; That the Plaintiff could not properly have proceeded to trial against the present defendants without discontinuing its suit as against said survivors, and the jury will not consider such discontinuance as a circumstance unfavorable to the Plaintiff's case or as any evidence of an intention on the part of the plaintiff to release said obligors from their liability on said bond, if the jury believe from the evidence that they are liable thereon; and the jury are instructed to disregard any and all remarks made by counsel in the presence or hearing of the jury to the effect that such discontinuance tends to prove an intention on the part of the Plaintiff to release said surviving obligors.

Given. J. T. D.

1290

18.

The court instructs the jury in this case that the court is the judge of the law and the jury are the judges of the facts, and it is the duty of the jury in considering their verdict to apply to the facts and circumstances in evidence the law as given to the jury in the instructions of the court, and thereby determine whether their verdict shall be for the Plaintiff or defendants.

Given. J. T. D.

1291

18a.

In regard to the document which has been received in evidence, dated April 14, 1904, being an option given to the Kapiolani Estate by the plaintiff for the sale of the property in question, I charge you that the court having decided in the replevin case that the property belonged to the plaintiff, the plaintiff had the right to sell
 plaintiff
 it or give an option on it whether [it]* had actual possession of it

[* Words enclosed in brackets erased in copy.]

at the time or not, and the option in question or any similar option could therefore have been given without prejudicing in any way the plaintiff's claim that Hutchins had not made a redelivery of the property.

Given. J. T. D.

1292

18b.

Nov.

In regard to the deed of conveyance dated [February]* 7th, 1905 from Clinton J. Hutchins, Trustee, to Francis B. McStocker, I instruct you that the legal construction and effect of that document was to convey to McStocker all of the property sold and conveyed to Hutchins by F. L. Dortch, receiver of the Kona Sugar Company, which he, Hutchins, had not already conveyed to the C. J. Falk and J. R. Sloan mentioned in said deed.

Given. J. T. D.

1293

19.

The jury are instructed that they are the judges of the credit that ought to be given to the testimony of the different witnesses, and the jury are not bound to believe anything to be a fact because a witness has stated it to be so, provided the jury believe from all the evidence that such witness is mistaken or has knowingly testified falsely.

Given. J. T. D.

1294

20.

The court instructs the jury that in determining the weight to be given to the testimony of the several witnesses you should take into consideration their interest in the event of the suit, if any such, is proved; their apparent candor or lack of candor, their apparent fairness or bias, if any such appears; their appearance and manner on the stand; the reasonableness or unreasonableness of the story told by them, and all the facts and circumstances tending to corroborate or contradict such witnesses, if any such are proved.

Given. J. T. D.

1295

21.

The court instructs you that in passing upon the testimony of the witnesses [for the defendants]* you have a right to take into consideration any interest which such witnesses may have in the result of this suit, if any is proved, and to give to the testimony of such witnesses only such weight as you think it entitled to under all the circumstances proved on the trial.

Given as modified. J. T. D.

1296

22.

The court instructs the jury that while it is the duty of the jury to carefully scrutinize and dispassionately weigh the evidence of all

[* Words enclosed in brackets erased in copy.]

the witnesses in the case, still it is your sworn duty to give proper credit to the evidence of each and all of the witnesses, and, if possible, to reconcile all of the evidence in the case with the presumption that each witness has intended to speak the truth, unless by their manner of testifying on the witness stand, or by inconsistent statements sworn to, or by testimony inconsistent with other credible evidence in the case, you are led to believe that the testimony of some one, or more, of the witnesses is untruthful or unreliable, or unless you are led to believe, from a manifestation of interest, bias or prejudice that such witness or witnesses have been inclined to exaggerate, color or suppress the truth, or unless they have been impeached in some of the modes known to the law.

Given. J. T. D.

1297

22a.

The Court instructs the jury with reference to all questions to which objections have been sustained by the Court and all testimony of witnesses which has been stricken out by the Court, as well as with reference to all papers and documents which have been offered but not received in evidence, that the jury should disregard all such matters as well as all remarks of counsel in relation thereto, if any have been made, and should consider only the evidence actually introduced on the trial in arriving at their verdict.

Given. J. T. D.

1298

23.

If the jury believe from the evidence that any witness has wilfully sworn falsely on the trial, as to any matter or thing material to the issues in the case, then the jury are at liberty to disregard the entire testimony of such witness, except in so far as it has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

Given. J. T. D.

1299

24.

The court instructs the jury that while the burden of proof rests upon the Plaintiff to make out its case by a preponderance of the evidence, still the preponderance of the evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their apparent candor or lack of candor, if any; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial; and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

Given. J. T. D.

1300

25.

The jury are instructed that it is not proper for counsel in the argument of a case, to state any matter or things bearing upon the questions of fact, and claimed to be within his own personal knowledge or which may have been stated to him by others, not witnesses in the case; and you are further instructed to disregard all such statements, if any have been made, and to make up your verdict upon the evidence actually given in this case without placing any reliance upon or giving any credit to any statements of counsel not supported by the evidence. In determining any of the questions of fact presented in this case you should be governed solely by the evidence introduced before you.

Given. J. T. D.

1301

25a.

The Court instructs the jury that the remarks made by counsel for defendants on this trial in calling on counsel for plaintiff to produce a certain paper stated by the witness Henry E. Cooper to have been drawn in the office of his firm but which he thought had not been executed and said to be a draft of a release of the property in question or some portion thereof by the Kapiolani Estate to William W. Bierce, Limited, should be disregarded by the jury in arriving at their verdict.

Refused. J. T. D.

1302

26.

The court instructs you that while an attorney is a competent witness for his clients on the trial of a cause, and the testimony of such a witness should not be disregarded by you simply because he is an attorney testifying in favor of his own clients, still in such a case the jury are the judges of the weight and credit to which such testimony is entitled, and it is proper for you to take into account the fact of such relation of attorney and client in determining the degree of weight which ought to be given to the testimony of such witness.

Given. J. T. D.

1303

27.

The court instructs you with reference to the testimony of the witness Scott, which was in substance that when called as a witness by the Plaintiff on the trial of the replevin suit mentioned in the evidence, in March, 1904, he testified that none of the so-called Bierce rails were laid on lands of one J. D. Paris, that unless the question whether some of the Bierce rails were laid on lands of said Paris was involved in or material to some issue in the replevin suit so as to be within the scope of the enquiry which the Plaintiff's attorneys were authorized to prosecute on the trial of that suit, such testimony would not amount to notice to the Plaintiff corporation of the fact so testified about. It is the law that notice to a corporation can only be given by giving it to some officer authorized to repre-

sent the corporation in the particular matter to which the notice relates; or else to some person whose situation and relation to the corporation imply authority to represent the corporation in such matter. In order to bind the Plaintiff corporation in any event such notice must be actual, and the Plaintiff is not chargeable with constructive notice by showing that subsequently the testimony was set forth in a transcript of the testimony filed in the case by the defendant for purposes of review in the Supreme Court. As it does not appear that such testimony was material to any issue in the replevin suit the jury should disregard it in considering their verdict.

Refused. J. T. D.

1304

28.

The court instructs the jury that a mainland corporation whose officers and stockholders are non-residents of this Territory is just as much entitled to the protection of the laws of this territory and the process of its courts as a natural person residing in this Territory, and the jury should not consider in arriving at their verdict the fact that the Plaintiff, William W. Bierce, Limited, is such a foreign corporation or that its officers and stockholders are non-residents of this Territory, or draw any inference unfavorable to the Plaintiff's case from these facts.

Refused. J. T. D.

1305

29.

If the jury find the issues for the Plaintiff, by their verdict, they should assess the Plaintiff's damages in their verdict at the sum of Twenty-two Thousand dollars (\$22,000.) determined to be the value of the property in question by the Judgment in Replevin, with Interest thereon at the rate of Six per cent. (6%) per annum, from April 15th, 1904 [until the date of the verdict,]* to which should be added Seven Hundred and Forty-eight Dollars and Fifty-seven cents (\$748.57), the amount of the judgment for costs rendered by the Supreme Court of the Territory on September 27th, 1907 in favor of William W. Bierce, Limited and against Clinton J. Hutchins, Trustee, with Interest thereon at the rate of Eight per cent. (8%) per annum from September 27th, 1907, [until the date of the verdict,]* aggregating the sum of \$28,156.74.

HENRY W. PROUTY,

A. G. M. ROBERTSON,

Attorneys for Plaintiff.

Honolulu, May 21st, 1908.

Endorsed: Law. 6023. Wm. W. Bierce, Ltd., v. C. J. Hutchins, Tr., et al. Instructions Requested by Plaintiff. Filed May 22nd, 1908, 6:21 P. M. Job Batchelor, Clerk. Messrs. A. G. M. Robertson & H. W. Prouty, for Plaintiff.

[* Words enclosed in brackets erased in copy.]

1306

Defendant's Instruction No. A.

I instruct you, gentlemen of the jury, to render a verdict in favor of the defendant.

Refused. J. T. D.

1307 In the Circuit Court of the First Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, et al., Defendants.

Instructions Requested by Defendants, William Waterhouse and Albert Waterhouse, Executors.

I.

I instruct you that the plaintiff must prove its case by a preponderance of evidence, and the burden of the proof is upon it. If it does not establish its case by such preponderance of evidence, then your verdict must be for the defendants.

Given. J. T. D.

1308

II.

The defendants in this action are sued as sureties upon a bond given for a re-delivery of the property sought to be replevined by the plaintiff in the replevin action of William W. Bierce, Limited, against Clinton J. Hutchins, Trustee. I instruct you that as such sureties they are entitled to stand upon the letter of their contract, and their undertaking is to be construed strictly in their favor and is not to be extended by implication or inference beyond the fair scope of its terms.

Am. & Eng. Enc. of Law, Vol. 27, p. 441.

Refused. J. T. D.

1309

III.

The contract imports entire good faith and confidence between the parties in respect to the whole transaction, and where the signature of a surety has been procured by the obligee through any fraudulent misrepresentation or concealment of material facts, the surety is not bound.

Am. & Eng. Enc. of Law, Vol. 27, p. 443.

Refused. J. T. D.

1310

IV.

The recital in the affidavit in the replevin case that the property was of the value of \$15,000 and the incorporation of the same statement in the undertaking given on replevin by the plaintiff creates an estoppel, so far as the plaintiff is concerned, to allege that the

property in suit was valued more than \$15,000, as against any one who had acted on the faith of that affidavit and recital; and as by Sec. 2112 of the Rev. Laws (L. 1884, c. 38, s. 12) and by the undertaking in suit, Henry Waterhouse, deceased, the defendants' testator, entered into the written undertaking to the effect that he was bound in double the value of the property, as stated in the affidavit of the plaintiff, no recovery could be had for the value of the property as against said Henry Waterhouse, deceased, as such surety or these defendants, his executors, beyond the said sum of \$15,000.

Refused. J. T. D.

1311

V.

A contract of suretyship may be avoided by a surety if the circumstances are such that it can be fairly inferred that the surety reposed confidence in the obligee and the latter suffered the former to deal under a material delusion; and if you find in this case that Henry Waterhouse, deceased, the defendants' testator, reposed confidence in the affidavit and statement of the plaintiff that the value of said goods did not exceed the sum of \$15,000 and entered into the obligation relying upon said affidavit and statement, then I instruct you that your verdict must be for the defendants.

Refused. J. T. D.

1312

VI.

The statutes of Hawaii provide that before any action can be brought against the estate of one deceased, as in this case, the Estate of Henry Waterhouse, deceased, a claim must be presented, duly authenticated and with the proper vouchers, to the executors within six months from the date of the first publication of the notice of creditors or within six months from the day they fall due, or they shall be forever barred, and the executors or administrators are not authorized to pay them, the statute expressly declaring that it shall not be lawful to allow any claim that is barred. It is necessary for you to find in this case that the claim in suit was so presented to the defendants as executors, with the proper vouchers and duly authenticated, or your verdict must be for the defendants.

Refused. J. T. D.

1313

VII.

The statutes of Hawaii also provide when suits on rejected claims can be commenced, and I instruct you that it is necessary for the plaintiff in this action to show that the claim in suit has been rejected by the executors and that the suit was brought within two months after written notice of the rejection. If the action in suit was brought before such rejection and notice, then the action is prematurely brought and your verdict must be for the defendants.

Refused. J. T. D.

1314

VIII.

Executors have a reasonable time in which to approve or reject claims under the statute, and it is incumbent upon the plaintiff to

show that a reasonable time had elapsed before the suit was brought, or else the action is prematurely brought and your verdict must be for the defendants. In considering this matter, you are entitled to take into consideration the date of the presentation of the claim sued upon, which is alleged in the complaint as September 30, 1904, the date of the bringing of the action October 11, 1904, the allegation that the claim has not been rejected or approved by the executors, the testimony of the defendant Albert Waterhouse, executor, that at the time of the bringing of the action the claim had not been rejected, but that he was consulting his co-executor, William Waterhouse, who was then in Pasadena, in the state of California, before taking any action upon the claim, and if in your judgment a reasonable time had not elapsed when this action was brought then your verdict should be for the defendants.

Refused. J. T. D.

1315

IX.

I instruct you that it is not necessary, in order to discharge the sureties from liability in this case, that a re-delivery of the goods should be made. The condition of the bond would be satisfied, so
valid

far as the sureties were concerned, by a tender made in good
valid
faith by the principal on the bond; and if you find that such tender was made, your verdict must be for the defendants.

Given as modified. J. T. D.

1316

X.

In making such tender, where the goods are of the character of those in suit, it is not necessary to make a manual delivery. It is
[for]* to be
enough that they be tendered [to be]* delivered in the same condition and at the same place as they were at the time the re-delivery bond was given.

Given. J. T. D.

1317

XI.

The plaintiff, the obligee of the bond, is bound to act in good faith and with reasonable promptness towards the defendants in this action, whose testator, Henry Waterhouse, was a surety; and in case
valid

you find that a tender was made, as I have already instructed you, the plaintiff was bound in good faith to such surety and his representatives to accept or reject it promptly.

Given. J. T. D.

[* Words enclosed in brackets erased in copy.]

1318

XII.

The plaintiff being so bound to act in good faith towards the surety, as described in the last instruction, cannot disable itself to promptly accept such delivery, and if in this case you find that it entered into a contract or option with the Kapiolani Estate, Limited, by which it bound itself not to remove the railroad material in question for thirty days, such agreement would discharge the surety from further obligation, and your verdict must be for the defendants.

Refused. J. T. D.

1319

XIII.

Entering into the negotiation and receiving the option (defendant's Exhibit 11), if you find such to be the fact, by the Kapiolani Estate, Limited, would estop it to claim as against the plaintiff in this action the property in suit, and the plaintiff and the Kapiolani Estate, Limited, are both presumed to know this to be the law, and you may consider the fact as bearing on the question of good faith of the plaintiff in not accepting the tender if you find such tender to be made.

Refused. J. T. D.

1320

Instruction No. 14.

I instruct you that even though it may be necessary for the defendant in a replevin action where the plaintiff has won his case against the defendant, to seek out the plaintiff and tender plaintiff the property, nevertheless, if the plaintiff has sought out the defendant and demanded of defendant a delivery of the property sued for, the plaintiff has waived its right to claim that the defendant should have sought plaintiff out, and such a waiver for the plaintiff is binding on the plaintiff in an action against the sureties on the redelivery bond; therefore, if you find from the evidence in this case that William W. Bierce, Ltd., sought out the defendant Hutchins and demanded of him the property concerned in the replevin action, you must find that William W. Bierce, Ltd., in this action or the re-delivery bond against the sureties on the bond waived the right of claiming that it was the duty incumbent upon Hutchins to seek out William W. Bierce, Ltd., and tender the property to it without any demand from William W. Bierce, Ltd.

Refused. J. T. D.

1321

Instruction No. 15.

I instruct you that in this action on the redelivery bond it is not necessary that a tender of property concerning which the bond was given should be kept good, and therefore if you find from the evidence that a valid tender of the property was once made by the principal obligor of the bond, Clinton J. Hutchins, Trustee,

or his agent, to William W. Bierce, Ltd. or its agent, then and thereafter there was no obligation or liability upon the part of Clinton J. Hutchins, Trustee, as far as the rights of his sureties are concerned to keep the property in a position to deliver it up to William W. Bierce, Ltd., for a valid tender once made which is refused by the creditor (William W. Bierce, Ltd. in this case) will discharge and release the surety (Estate of Henry Waterhouse in this case) at once from all liability on the redelivery bond, and your verdict should be for the defendants.

Child's Suretyship & Guaranty, p. 247-8.

Smith v. Building & Loan Assn., 119 N. C. 260.

Mitchell v. Roberts, 17 Fed. 780.

Given. J. T. D.

1322

Instruction No. 16.

I instruct you that the plaintiff William W. Bierce, Ltd. being a corporation and only able to act through its officers or attorneys or agents, that all evidence as to the acts of its officers, attorneys

as the acts of the corporation itself

and agents are to be considered by you on the question as to whether the corporation plaintiff acted in good faith toward the surety on the redelivery bond ([the Estate of]* Henry Waterhouse, deceased) in all matters connected with the replevin suit and the judgment obtained in such replevin suit.

Given. J. T. D.

1323

Instruction No. 17.

In instruct you that the statute law under which the redelivery bond was given as well as all other law of the Territory of Hawaii at the time of execution and delivery of the redelivery bond entered into and formed a part of the contract of sureties, one of which was Henry Waterhouse, deceased, the executors of whose will and estate are defendants in this action, and that the said defendants are not bound by any acts done in pursuance of the amendment of the Organic Act of March 3, 1905, and I therefore instruct you to render a verdict for defendants.

Refused. J. T. D.

1324

Instruction No. 18.

I instruct you that the contracts of sureties are closely scrutinized, that sureties are favorites in the law and that the courts always compel the utmost good faith on behalf of the creditor in all his dealings whereby he seeks to create a liability of the surety on his bond and if by the creditor's acts the contract of the surety is altered, enlarged or changed or he is otherwise injuriously prejudiced be-

[* Words enclosed in brackets erased in copy.]

yond the very terms of his conduct, he is released accordingly if you find from the evidence that the plaintiff first endeavored to sell the property concerned in the replevin suit and then adopted a change of policy and endeavored to then create a surety's liability on the bond, the sureties are thereby released.

Refused. J. T. D.

1325

Instruction No. 19.

If you find from the evidence that the plaintiff William W. Bierce, Ltd., in its dealings with the Alexander & Baldwin, Ltd., or in its dealings with the Kapiolani Estate, Ltd., or with others, treated or dealt with the property concerned in the replevin action

and under its control
as its own ^ then as a matter of law I charge you that by such acts they waived any tender of said property by the principal or surety of the redelivery bond, and the surety, the executors of the Estate of Henry Waterhouse are released and your verdict should be for the defendants.

Refused. J. T. D.

1326

Instruction No. 20.

I instruct you that if you should find from the evidence that even though plaintiff's agent H. E. Cooper, believed he could not obtain certain portions of the property at Kona, Hawaii, still that did not discharge him representing William W. Bierce, Ltd., or discharge or relieve William W. Bierce, Ltd. from receiving any other portion of the property situated at Kona, Hawaii, which you find from the evidence was tendered him.

Refused. J. T. D.

1327

Instruction No. 21.

I instruct you that a refusal to accept tender is a waiver of tender, and if from the evidence you find that William W. Bierce, Ltd. through its agents or attorneys refused to accept the tender of the property from Clinton J. Hutchins, Trustee, or his agent, then it was not necessary for, and Clinton J. Hutchins, Trustee, was not called upon to go upon the premises at Kona and point out each individual item of the property covered by replevin action, and the sureties the Waterhouse Estate, are released by such waiver of tender.

Refused. J. T. D.

Respectfully requested,

SMITH & LEWIS,
CASTLE & WITHINGTON,
JNO. W. CATHCART,
Attorneys for Defendants.

1328

Defendant's Instruction No. 22.

I instruct you that although you may find from the evidence that there were certain claims against the property in question at the time of the tender, still nevertheless if you find from the evidence that the plaintiff acting in good faith, was not influenced by said claims, then said claims cannot be urged by plaintiff as a ground for refusal to accept a tender.

Refused [Given].* J. T. D.

1329

Defendants' Instruction No. 23.

Although, gentlemen of the jury, I have heretofore instructed you that certain facts are undisputed in the evidence on trial, there are however certain other facts which are also undisputed in the evidence, which are as follows:

That prior to and at the time of the execution of the re-delivery bond, William Bierce Ltd. had knowledge of the situation of the property in question in Kona, Hawaii, that said property was not piled up or stored, but was laid down and used as a plantation railway and equipment; and that at no time during the replevin action

in the evidence [in this action]*

or the times referred to [^] in this action on the bond was any of said

from the premises or so-called Kona Plantation;

property removed [or changed or taken]* [^] away [from the situs or state existing at the time the redelivery bond was given;]* that at the time the special execution introduced in evidence was issued on said judgment on April 15, 1904, the defendants had appealed to the Supreme Court of Hawaii from the judgment of the Circuit Court which had issued such execution [that at the time said bond was executed no appeal could be maintained from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States. That after the decision of the Supreme Court of said Territory on January 28, 1905, in favor of defendants, there was enacted on March 5, 1905, an amendment to the Organic Act of the Territory of Hawaii permitting such appeals where the amount in controversy exceeded \$5,000, and under and by virtue of the provisions of said Act of March 5, 1905, William W. Bierce, Ltd. prosecuted its appeal to the Supreme Court of the United States. That while Albert Waterhouse, one of the executors of the Estate of Henry Waterhouse, deceased, to whom said claim was presented on September 30, 1904, was communicating to his co-executor William Waterhouse in Pasadena, California, as to said claim, and before any conclusion had been reached as to any action on said claim plaintiff on October 11, 1904, instituted this action.]*

[Given as modified. J. T. D.]

[* Words and figures enclosed [^] brackets erased in copy.]

1330

Defendants' Instruction No. 24.

I instruct you that a surety is entitled to stand upon the letter of his contract. To the extent and in the manner and the circumstances pointed out in his obligation he is bound and no further, and you are accordingly instructed that the options of William W. Bierce, Ltd., to Alexander & Baldwin, Ltd., Kapiolani Estate, Ltd., and C. J. Hutchins, Trustee, may be considered by you together with other facts upon the question as to whether or not as far as the rights of the sureties are concerned as defined by the instructions of the Court, a sufficient tender was made by Hutchins to Wm. W. Bierce, Ltd.

Refused. J. T. D.

Endorsed: Original. Law. No. 6023. Circuit Court, First Circuit, Territory of Hawaii. William W. Bierce, Limited, a corporation, Plaintiff, vs. Clinton J. Hutchins, Trustee, et al., Defendants. Instructions requested by defendants William Waterhouse and Alfred Waterhouse, Executors. Filed May 22nd, 1908, at 6:20 p. m.. Job Batchelor, Clerk. Castle & Withington, Attorneys for Defendants.

1331 In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1908.

Law. 6023, Dock. 26/60.

WM. W. BIERCE, LTD.,

v.

WM. WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Verdict.

We, the jury in the above entitled cause find for the plaintiff and against the defendants Wm. Waterhouse and Albert Waterhouse as executors under the Will and of the Estate of Henry Waterhouse deceased for the sum of \$22,000.00 with interest thereon at the rate of 6% per annum from April 15th, 1904, also for the sum of \$748.57 with interest thereon at the rate of 8% per annum from September 27th, 1907, the aggregate sum of the principal and interest being \$28,156.74.

Honolulu, T. H., May 22nd, 1908.

J. F. SOPER, Foreman.

Endorsed: L. 6023. Circuit Court, First Circuit, Territory of Hawaii. William W. Bierce, Ltd., v. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased. Verdict. Filed May 22nd, 1908, at 9:46 P. M. Job Batchelor, Clerk.

1332 In the Circuit Court of the First Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under
the Will and of the Estate of Henry Waterhouse, Deceased, De-
fendants.

Assumpsit.

Motion for Judgment Non Obstante Veredicto.

Now come the above named defendants, and move that judgment be entered in favor of the defendants and against the plaintiff, notwithstanding the verdict of the jury, on the following grounds:

1. That the complaint does not show any cause of action against these defendants.

2. That the action was prematurely brought and that no valid claim has been presented to the defendants and rejected by them, and that the evidence shows that a reasonable time had not elapsed after the alleged presentation of the claim before this action was brought in which to approve or reject said claim.

3. Upon all the grounds set out in plea in abatement filed by the defendants in this action.

4. That the evidence shows that there was no consideration given for the bond in suit, and that it is not binding on these defendants.

1333 5. That at the time when this action was brought the judgment entered against the principal defendant, Clinton J. Hutchins, Trustee, was stayed by the proceedings taken on the bill of exceptions to the Supreme Court of Hawaii, and that as against the defendants in this action the Circuit Court of the First Circuit had no authority to order any further bond or security on appeal to be given, or to order said judgment to be enforced or execution to issue thereon, since the act under which said orders were made went into force on August 1, 1903, subsequently to bringing of the replevin action of Bierce v. Hutchins, Trustee, and the giving of the re-delivery bond on which this suit was brought.

6. Because said judgment in the replevin action of Bierce v. Hutchins rendered in the Circuit Court of the First Circuit was reversed by the Supreme Court of Hawaii on the 28th day of January, 1905, and also by the order of May 6, 1905, and that at the time of the giving of the re-delivery bond upon which this suit was brought said judgment of the Supreme Court of Hawaii was final and conclusive as to these defendants, and that the subsequent passage of the act of Congress March 3, 1905, amending the Organic Act did not and could not affect the liability of these defendants and the sureties upon said bond, the said bond being entered into with reference to existing provisions of law and the same becoming a part of the contract; and the subsequent reversal of the decision of the Supreme Court of Hawaii and the entry of

the order of said Supreme Court setting aside its former decision and overruling the exception does not affect the sureties on said bond or the liability of the defendants in this action, whose liability was terminated by the said proceedings in the Supreme Court of Hawaii January 28, 1905, and May 6, 1905.

1334 6a. That the contract of the sureties on the re-delivery bond was altered, changed and or extended by the appeal to the Supreme Court of the United States under and by virtue of the amendment of March 3, 1905, of the Organic Act by the plaintiff in the said replevin action of Bierce vs. Hutchins, Trustee.

7. Because the affidavit in replevin and the complaint based on the affidavit setting out the sworn value of the property in suit, upon which affidavit and complaint by law the re-delivery bond is based, which bond recites that the property is "of the value of \$15,000, as stated in the affidavit filed herein," is and are judicial admissions made by the plaintiff in this action, upon which the sureties in signing said re-delivery bond had a right to rely, and as to the sureties, the defendants in this action the plaintiff is estopped to claim that the value of said property is more than \$15,000; and the subsequent proceedings by which the allegations of said complaint were amended to increase the alleged value first to \$20,000 and then to \$22,000, and the recovery of judgment for \$22,000 as the value of said property, operated to release the sureties from the obligation of said re-delivery bond and are not binding against said sureties, the defendants in this action.

8. That the amendment to the complaint in said action, by which the cause of action is alleged to arise wholly out of the contract of March 13, 1901, and not out of the contract of February 21, 1901, constituted a change of the cause of action upon which the said re-delivery bond was given and released the sureties from their obligation under any judgment rendered in said action.

9. Because the uncontradicted evidence shows an offer to return the property in accordance with said bond, and a tender of the same, which discharged the sureties upon said bond.

1335 10. That, whether a valid tender of said property were made or not, the offer to return, duly made, was so far accepted by the plaintiff that it operated as a discharge of the sureties upon the said bond.

11. That the so-called option to the Kapiolani Estate, Limited, and the notice to it given by the plaintiff April 19, 1904, subsequent to said offer to return, by means of which the plaintiff disabled itself for thirty days to remove the property from its *situs*, coupled with its notice to the defendant in the suit not to use or disturb the property in the meantime, and the fact that the uncontradicted evidence in this case shows that no action was taken by the plaintiff until after the expiration of said thirty days, viz., until the 20th day of May, 1904, and that the said defendant, Clinton J. Hutchins, Trustee, did not disturb or use said property during said time, in law discharged the sureties upon said bond from further liability.

12. That after the Kapiolani Estate, Limited, on April 14, 1904, had accepted from plaintiff a thirty-day option to purchase the prop-

erty covered by the replevin bond, and while said option was outstanding and in force and effect, the said plaintiff had caused execution to issue in the replevin action and to be delivered into its possession on April 15, 1904, it then and there became the duty of the said plaintiff, acting in good faith to the surety on the replevin bond, to cause said execution to be immediately placed in the hands of the sheriff and executed; that said execution was not so immediately executed, but on the contrary was held and secreted in the hands of plaintiff's attorneys at law and in fact was not placed in the hands of the deputy sheriff for the purpose of execution until 1336 May 21 or May 23, 1904, and after said option had expired; that said delay was prejudicial to the rights of the surety, and as a matter of law released the surety.

13. That the original action was still pending at the time when this suit was brought.

14. That there is no evidence upon which a verdict could be rendered for any sum against these defendants.

Dated, Honolulu, May 26, A. D. 1908.

(Sig.)

SMITH & LEWIS,

(Sig.)

CASTLE & WITHINGTON,

Attorneys for Defendants.

Endorsed: Original No. 6023. Circuit Court, First Circuit, Territory of Hawaii. 26/60. William W. Bierce, Limited, a Corporation, Plaintiff, vs. William Waterhouse and Albert Waterhouse, Executors, etc., Defendants. Motion for Judgment Non Obstante Verdicto. Filed May 26th, 1908, 9:8 A. M. Job Batchelor, Clerk. Castle & Withington, Attorneys for Defendants. Motion denied, May 25/08. J. B.

1337 In the Circuit Court of the First Circuit, Territory of Hawaii, 1908 Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Motion for New Trial.

The defendants, William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, come and move that the verdict in said action and judgment entered therein be set aside, and for a new trial, upon the following grounds:

1. That the verdict and judgment are against the law.
2. That the verdict and judgment are against the evidence and the weight of the evidence.

3. Errors of law occurring during the trial, in the admission and rejection of evidence, and excepted to by these defendants.

4. Refusal to give instructions to the jury requested by these defendants, which refusal was excepted to by these defendants.

5. Errors in giving instructions to the jury requested by the plaintiff, the giving of which was excepted to by these 1338 defendants.

Without waiving other errors, the defendants specify, as particular errors referred to under subdivision, 3, 4 and 5, the following:

I.

Errors in the Admission and Rejection of Evidence.

(a) The refusal to admit in evidence copy of the surrender from the Kapiolani Estate, Limited, to William W. Bierce, Limited, of the property in question, and the evidence of the witness John F. Colburn offered in connection with the same.

(b) The exclusion, both by rejection and striking out, of the evidence of the witness Henry E. Cooper in regard to a change of policy on the part of the plaintiff in reference to securing possession of the property in question.

(c) The exclusion of the evidence of instructions from the plaintiff to its attorneys-in-fact and attorneys-at-law, Kinney, McClanahan and Cooper, in reference to obtaining possession of the property, asked on cross-examination of said witness when offered as a witness to show effort to obtain such possession.

(d) The refusal of the court to allow said witness, on cross-examination, to disclose what were the instructions of his principal under which he was acting at the time of his trip to Kona, which he had testified in chief he had made to get possession of the property in reference to a change of policy on the part of said plaintiff in reference to said matter.

(e) The refusal to admit in evidence the letter of Kinney, McClanahan and Cooper dated April 19, 1904, or to allow the witness to refresh his recollection from said letter.

1339 (f) The refusal to allow the witness to testify on cross-examination that, as agent of the plaintiff, he dealt with the Kapiolani Estate, Limited, upon the idea that a surrender of the property had been executed by them.

(g) The admission in evidence of the trust deed from Clinton J. Hutchins, Trustee, to the Henry Waterhouse Trust Company, Limited, (Plaintiff's Exhibit "MM"), and the refusal to strike out the same.

(h) The admission in evidence of the notice from John Paris (Plaintiff's Exhibit "NN").

(i) The admission in evidence of the deeds from Hutchins to McStocker (Plaintiff's Exhibit "GG") and McStocker to Kona Development Company (Plaintiff's Exhibit "HH"), long after the transactions in question, and the evidence of other dealings with

said property long subsequent to the offer to return the property relied on by these defendants.

(j) The refusal to allow the witness Shingle to testify as to the relations between Clinton J. Hutchins, Trustee, and one Linder, shown at a subsequent time to have been using the property in question.

II.

Error in refusing to give defendants' Instructions Nos. 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 17, 18, 19, 20, 21, 22, and 24, and each of them.

III.

The giving of plaintiff's requests for instructions Nos. 2 (as modified), 2-a, 3, 4, 5, 6, 6a, 7, 8, 9, 10, 12, 13c, 13d, 14, 15, 16, 17, 18, 18a, 18b, 19, 20, 21, 22, 22a, 23, 24, 25, 26 and 29, and each of them.

6. That the complaint does not show any cause of action against these defendants.

1340 7. That the action was prematurely brought and that no valid claim had been presented to the defendants and rejected by them, and that the evidence shows that a reasonable time had not elapsed after the alleged presentation of the claim before this action was brought in which to approve or reject said claim.

8. Upon all the grounds set out in plea in abatement filed by the defendants in this action.

9. That the evidence shows that there was no consideration given for the bond in suit, and that it is not binding on these defendants.

10. That at the time when this action was brought the judgment entered against the principal defendant, Clinton J. Hutchins, Trustee, was stayed by the proceedings taken on the bill of exceptions to the Supreme Court of Hawaii, and that as against the defendants in this action the Circuit Court of the First Circuit had no authority to order any further bond or security on appeal to be given, or to order said judgment to be enforced or execution to issue thereon, since the act under which said orders were made went into force on August 1, 1903, subsequently to bringing of the replevin action of *Bierce v. Hutchins*, Trustee, and the giving of the re-delivery bond on which this suit was brought.

11. Because said judgment in the replevin action of *Bierce v. Hutchins* rendered in the Circuit Court of the First Circuit was reversed by the Supreme Court of Hawaii on the 28th day of January, 1905, and also by the order of May 6, 1905, and that at the time of the giving of the re-delivery bond upon which this suit was brought said judgment of the Supreme Court of Hawaii was final and conclusive as to these defendants, and that the subsequent passage of the act of Congress March 3, 1905 amending the Organic Act
1341 did not and could not affect the liability of these defendants and the sureties upon said bond, the said bond being entered into with reference to existing provisions of law and the same becoming a part of the contract; and the subsequent reversal of the de-

cision of the Supreme Court of Hawaii and the entry of the order of said Supreme Court setting aside its former decision and overruling the exception does not affect the sureties on said bond or the liability of the defendants in this action, whose liability was terminated by the said proceedings in the Supreme Court of Hawaii January 28, 1905, and May 6, 1905.

12. That the contract of the sureties on the redelivery bond was altered, changed or extended by the appeal to the Supreme Court of the United States under and by virtue of the amendment of March 3, 1905, of the Organic Act, by the plaintiff in the said replevin action of *Bierce v. Hutchins, Trustee*.

13. Because the affidavit in replevin and the complaint based on the affidavit setting out the sworn value of the property in suit, upon which affidavit and complaint by law the re-delivery bond is based, which bond recites that the property is "of the value of \$15,000, as stated in the affidavit filed herein," is and are judicial admissions made by the plaintiff in this action, upon which the sureties in signing said re-delivery bond had a right to rely, and as to the sureties, the defendants in this action the plaintiff is estopped to claim that the value of said property is more than \$15,000, and the subsequent proceedings by which the allegations of said complaint were amended to increase the alleged value first to \$20,000 and then to \$22,000, and the recovery of judgment for \$22,000 as the value of said property, operated to release the sureties from the obligation of said re-delivery bond and are not binding against said sureties, the defendants in this action.

1342 14. That the amendment to the complaint in said action, by which the cause of action is alleged to arise wholly out of the contract of March 13, 1901, and not out of the contract of February 21, 1901, constituted a change of the cause of action upon which said re-delivery bond was given and released the sureties from their obligation under any judgment rendered in said action.

15. Because the uncontradicted evidence shows an offer to return the property in accordance with said bond, and a tender of the same, which discharged the sureties upon said bond.

16. That, whether a valid tender of said property were made or not, the offer to return, duly made, was so far accepted by the plaintiff that it operated as a discharge of the sureties upon the said bond.

17. That the so-called option to the Kapiolani Estate, Limited, and the notice to it given by the plaintiff April 19, 1904, subsequent to said offer to return, by means of which the plaintiff disabled itself for thirty days to remove the property from its *situs*, coupled with its notice to the defendant in the suit not to use or disturb the property in the meantime, and the fact that the uncontradicted evidence in this case shows that no action was taken by the plaintiff until after the expiration of said thirty days, viz., until the 20th day of May, 1904, and that the said defendant, Clinton J. Hutchins, Trustee, did not disturb or use said property during said time, in law discharged the sureties upon said bond from further liability.

18. That after the Kapiolani Estate, Limited, on April 14, 1904,

had accepted from plaintiff a thirty-day option to purchase the property covered by the replevin bond, and while said option 1343 was outstanding and in force and effect, the said plaintiff had caused execution to issue in the replevin action and to be delivered into its possession on April 15, 1904, it then and there became the duty of the said plaintiff, acting in good faith to be immediately placed in the hands of the sheriff and executed; that said execution was not so immediately executed, but on the contrary was held and secreted in the hands of plaintiff's attorneys at law and in fact and was not placed in the hands of the deputy sheriff for the purpose of execution until May 21 or May 23, 1904, and after said option had expired; that said delay was prejudicial to the rights of the surety, and as a matter of law released the surety.

19. That the original action was still pending at the time when this suit was brought.

20. That there is no evidence upon which a verdict could be rendered for any sum against these defendants.

Dated, Honolulu, May 29, A. D. 1908.

(Sig.)

SMITH & LEWIS,

(Sig.)

CASTLE & WITHINGTON,

Attorneys for Defendants, Executors Waterhouse Est.

Endorsed: Law. 6023. Circuit Court, First Circuit, Territory of Hawaii. 1908 Term. William W. Bierce, Limited, a Corporation, Plaintiff, vs. Clinton J. Hutchins, Trustee, Arthur B. Wood, and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, Defendants. Motion for New Trial. Filed May 29, 1908, at 5:10 o'clock P. M. J. A. Thompson, Clerk. Smith & Lewis, Attorneys at Law, Honolulu, T. H. Judd Building.

1344 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term, A. D. 1908.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,

vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Judgment.

This action by complaint as amended, claiming Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages, came to the September Term A. D. 1904, and thence by continuance to the present Term, when the parties appeared, and were at issue to the jury.

Said cause having been heard and committed to the jury, they find for the plaintiff to recover Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages.

Therefore it is ordered and adjudged by the Court that the plaintiff, William W. Bierce, Limited, do have and recover from the defendants, William Waterhouse and Albert Waterhouse as Executors under the Will and of the Estate of Henry Waterhouse, deceased, Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages, together with its attorneys' fees or commissions taxed at Seven Hundred Eleven and 42/100 Dollars (\$711.42) and its costs taxed at (\$81.45) to be paid 1345 in due course of administration.

By the Court:

(Sig.)
[SEAL.]

JOB BATCHELOR,
Clerk.

Entered this 29th day of May, 1908, as of the January term, 1908.

Endorsed: Law. 6023. Circuit Court, First Judicial Circuit. William W. Bierce, Limited, vs. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased. Judgment. Filed May 29th, 1908, at 3:45 o'clock P. M. L. P. Scott, Clerk.

1346 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

January 3rd, 1906, 10 A. M.

Before the Hon. J. T. De Bolt, First Judge.

Law. 6023. Vol. 1, Page 101.

WM. W. BIERCE, LTD.,

v.

CLINTON J. HUTCHINS, Trustee, et al.

Assumpsit.

Motion for Continuance.

A. G. M. Robertson for Plaintiff.

Messrs. D. L. Withington and A. J. Lewis, Jr., for Defendants.
J. L. Horner, Stenographer.

Mr. Robertson reads motion and affidavit of A. G. M. Robertson. Mr. Lewis reads Demurrer and argues. Mr. Withington argues and offers in evidence all papers in the Original Suit. L. 5782. Also the order in Calendar of January 1906 Term. Mr. Robertson argues.

Court grants the continuance of motion until next term.

JOB BATCHELOR, Clerk.

1347 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, April Term, A. D. 1906.

Before the Hon. Alexander Lindsay, Jr., Second Judge.

Law. 6023.

Vol. 1, — Term, Page 224.

Wednesday, April 4, 1906.

W. W. BIERCE, LTD.,

v.

C. J. HUTCHINS et al.

Assumpsit.

Cont. 4/3/'06 a. m.

A. Lewis, Esq., of Smith and Lewis for Defendants asks for immediate hearing.

A. G. M. Robertson, Esq., presents motion for Plaintiff to strike case from Calendar. Messrs. Withington and Lewis on behalf on defense and Mr. Robertson opposing argue motion.

Mr. Withington calls as witnesses:

George Lucas, Clerk of Supreme Court, sworn.

The Court denies motion, exception by Mr. Robertson. Mr. Robertson presents motion for continuance. Messrs. Withington and Lewis further urge immediate trial, and Court orders continuance till Friday, Apr. 6, 1906, 10 A. M.

April Term, A. D. 1906.

Friday, April 6th, A. D. 1906.

Present:

Hon. A. Lindsay, Jr., 2nd Judge Presiding.

1348 W. R. Sims, Clerk.

G. D. Bell, Stenographer.

Law. 6023.

Vol. 1, — Term, Page 232.

W. W. BIERCE, LTD.,

v.

C. J. HUTCHINS et al.

Assumpsit.

Motion for Continuance.

Cont. 4/4/'06.

Mr. Robertson, attorney for Plaintiff resumes argument in favor of motion. Mr. Lewis for defense presents Counter Affidavit on motion for continuance and argues.

Circuit Court, First Circuit, Law Record # 5782 received in evidence, the objection of Mr. Robertson thereto being overruled and exception allowed.

Mr. Withington supplements argument contra to continuance.

Mr. Robertson replies and Court grants motion for continuance to Sept., 1906, Term, exception by Defendants—Recess till 2 P. M. when Court resits.

1349 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, September Term, A. D. 1906.

Thursday, Sep. 6, 1906.

Present:

Hon. W. J. Robinson, Third Judge.

M. T. Simonton, Clerk.

J. W. Jones, Official Stenographer.

Law. 6023.

Vol. 5, — Term, Page 79.

WILLIAM W. BIERCE, LIMITED,

v.

CLINTON J. HUTCHINS, Trustee, et al.

Assumpsit.

Came on to be heard at 9:30 o'clock A. M. this day defendants' motion that the above-entitled cause be set for trial on a day certain; also plaintiff's motion for a continuance until the next Term of this Court and stay of proceedings; A. G. M. Robertson, Esq., appearing as attorney for plaintiff, and Messrs. A. Lewis, Jr., and D. L. Withington appearing as attorneys for defendants.

Mr. Robertson reads motion for a continuance and stay of proceedings, also affidavits attached thereto and made a part thereof, are argues.

Mr. Lewis argues.

Thereupon the Court orders: "The motion for a continuance is granted, and the action is continued until the next Term of this Court, to wit: the January, 1907, Term.

"Defendants' motion that the cause be set for trial for a day certain is denied."

Mr. Lewis notes an exception on behalf of all defendants.

The COURT: "Exception allowed."

1350 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Friday, May 22nd, 1908—9:30 a. m.

Before the Hon. J. T. De Bolt, First Judge.

Law. 6023.

Vol. 2, — Term, Page 326.

W. W. BIERCE, LTD.,

v.

C. J. HUTCHINS, Tr., et al.

Assumpsit.

Twelfth Day.

Messrs. A. G. M. Robertson, and H. W. Prouty for Plaintiff.

“ J. W. Cathcart and Castle and Withington for C. J. Hutchins, Tr., et al.

Smith & Lewis for Executors of Henry Waterhouse deceased.

J. L. Horner, Stenographer.

Court and Counsel concluded settlement of instructions. The Jury took their seats at 10:8 A. M. as follows:

Charles Lucas.

E. V. Dunn.

Wm. Rose.

George H. Greene.

J. A. Wilder.

W. A. Dickson.

W. W. Buckle.

Henry Kaai.

U. F. Lemon.

W. E. Kimball.

J. F. Soper.

A. G. Kannegiesser.

Mr. Lewis for Defendants moved for a directed verdict motion was denied, excepted taken and allowed.

Mr. Robertson commenced opening argument for Plaintiff at 10:30 A. M.

Court adjourned at 12 o'clock noon until 1:30 P. M.

1351

Afternoon Session.

Jury and all same parties present.

Mr. Robertson resumed argument at 1:30 P. M., and closed at 2:39 P. M.

Recess at 2:40 P. M., for five minutes.

Mr. Lewis commenced to argue for Defendants at 2:47 P. M., closing at 3:52 P. M. Mr. Cathcart argues for Defendants at 3:55 P. M., and closed at 5:8 P. M.

Recess at 5:10 P. M., for ten minutes.

Mr. Robertson made closing argument at 5:20 P. M. and closed at 5:55 P. M., Court reads instructions at 5:55 and closed at 6:27 P. M. Plaintiff excepts to the Court's refusal to give Plaintiff's instructions Nos. 1, 11, 13, 13a, 13b, 25a 27 and 28 and to the modification of Plaintiff's instructions Nos. 2, 8, 10, 13e, 16 and to giving Defendants' instructions No. 9, 10, 15, 16 and 23. Defendants excepts to the Court's giving Plaintiff instructions Nos. 2, 2a, 3, 4, 5, 6, 6a, 7, 9, 12, 13c, 14, 17, 18a, 20, 21, 22a, 23, 24, 25, 26, 29 and to giving Plaintiff's instructions as modified Nos. 8, 10, 13d, 15, 16 and to the Court's refusal to give Defendants' instructions Nos. A, 2, 3, 4, 5, 6, 7, 8, 12, 13, 14, 17, 18, 19, 20, 21, 22 and to the modification of Nos. 23 and 24.

The Jury retired to the Jury Room at 6:33 P. M. and returned to the Court Room at 7:10 P. M., whereupon the Court ordered the Bailiff to take the Jurors to dinner and thence to return to the Jury Room and consider the Verdict. The Jury asked to have the instructions sent to them. Court ordered same to be sent to them. Mr. Lewis for Defendants made formal objection. Court allowed the objection. The Jury also asked for the Deed, Dortch receiver to Hutchins Trustee and the Deed Hutchins Trustee to the H. Waterhouse Trust Co. Ltd. Court ordered the said Deeds sent to the Jury.

Defendants object to the said Deeds being sent to the Jury
1352 on the grounds that said Deeds are improper to go to the Jury Room, Second that they are incompetent, immaterial irrelevant. Court overruled the objection. Defendants except. Certified Copy of the Deed Dortch receiver to Hutchins Trustee that was sent to the Jury Room was ordered filed and put with the papers in the case.

The Jury returned to the Court Room at 9:45 P. M., with the following Verdict. We the Jury in the above entitled cause find for the Plaintiff and against the Defendants Wm. Waterhouse and Albert Waterhouse as Executors under the Will and of the Estate of Henry Waterhouse deceased for the sum of \$22,000.00 with interest thereon at the rate of 6% per annum from April 15th, 1904, also for the sum of \$748.57 with interest thereon at the rate of 8% per annum from September 27th 1907, the aggregate sum of the principal and interest being \$28,156.74.

Mr. Lewis on behalf of Defendants excepts to the Verdict as being contrary to the law and the evidence and to the weight of the evidence and gave notice of filing a motion for a new trial. Mr. Withington for Defendants excepts to the Verdict and asks that Judgment be not entered and that he be given until Tuesday May 26th 1908, at 9 A. M. to file a motion for a judgment Non Obstante Verdicto. The Court fixes 9 A. M., Tuesday May 26th for hearing said motion, all counsel being present, notice waived.

Court adjourned at 9:48 P. M. The Jury were excused until Monday, May 25th at 10 A. M.

By order of the Court.

JOB BATCHELOR, Clerk.

1353

Tuesday, May 26th, 1908, 9 a. m.

Before the Hon. J. T. De Bolt, First Judge.

Law. 6023.

Vol. 2, — Term, Page 333.

W. W. BIERCE, LTD.,

v.

C. J. HUTCHINS, Tr., et al.

Assumpsit.

Messrs. A. G. M. Robertson and H. W. Prouty for Plaintiff.

" Castle & Withington for C. J. Hutchins Tr. et al.

" Smith and Lewis for Exrs. H. Waterhouse deceased.

J. L. Horner, Stenographer.

Motion for Judgment Non Obstante Ver-dicto.

Mr. Withington presents above motion which was filed at 9:8 A. M., reads same and argues in favor of motion and quotes authorities. Mr. Lewis argues in favor of motion and quotes authorities. Motion for Judgment Non Obstante Ver-dicto is denied. Defendants excepts. Exception allowed.

By order of the Court.

JOB BATCHELOR, *Clerk.*

Monday, June 1st, 1908, 9 a. m.

Before the Hon. J. T. De Bolt, First Judge.

Law. 6023.

Vol. 2, — Term, Page 338.

WM. W. BIERCE, LTD.,

v.

WM. WATERHOUSE and ALBERT WATERHOUSE, Executors of Henry Waterhouse, Deceased.

Assumpsit.

Motion for New Trial.

1354 Messrs. A. G. M. Robertson and H. W. Prouty for Plaintiff.

" D. L. Withington and A. Lewis Jr. for Defendants.

J. L. Horner, Stenographer.

Mr. Withington reads motion and argues. Mr. Lewis argues and quotes authorities. Mr. Robertson argues.

Court adjourned at 12 o'clock noon until 1:30 P. M.

1:30 P. M.

Mr. Robertson continued argument. Mr. Prouty argues and quotes authorities. Mr. Withington argues. Mr. Lewis made closing argument.

The motion for a new trial is denied.

Defendants excepts, exception allowed. On motion of counsel for Plaintiff in open Court, and there being no objection by counsel for Defendants, Plaintiff may have until August 1st 1908 to make objections to any Bill of Exceptions which Defendants may present for allowance.

By order of the Court.

JOB BATCHELOR, *Clerk*.

1355 In the Circuit Court of the First Circuit, Territory of Hawaii.

• WILLIAM W. BIERCE, LTD., Plaintiff,

vs,

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors, &c.,
Defendants.

Subpœna.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the County of Oahu, or his Deputy, or any Police Officer in the Territory of Hawaii:

You are commanded to Subpœna John F. Colburn, of Honolulu to appear at the Court House in Honolulu County of Oahu before Hon. J. T. De Bolt on Tuesday the 19th day of May, 1908, at ten o'clock a. m., in the above entitled matter.

Hereof fail not, and of this process make due return.

Witness the Honorable J. T. De Bolt, First Judge of the Circuit Court of the 1st Circuit, this 18th day of May 1908.

J. A. THOMPSON, *Clerk*.

Endorsed: Law 6023. Circuit Court, First Circuit. Bierce v. Hutchins. Subpœna. Issued at — o'clock — M. ——— 190—, ———, Clerk.

Served the within Subpœna by reading the same to the within named John F. Colburn at Honolulu, County of Oahu this 18th day of May 1908, and at the same time handed him the sum of \$1.00 as witness fees, and the sum of — as traveling fees. Rob't Parker, Jr.

Returned at 2:10 o'clock P. M. May 18, 1908. L. P. Scott, Clerk.

1356 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

v.

CLINTON J. HUTCHINS, Trustee, etc., and WILLIAM WATERHOUSE and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Præcipe.

To J. A. Thompson, Esq., Clerk of said Court.

SIR: Please prepare Record for Supreme Court in the above entitled case on Exceptions thereto according to the following list of pleadings, papers, documents, etc., on file, and of record in said Court and cause, and transmit the same to said Supreme Court.

Copy Original Complaint,

" Plea in Abatement to Complaint,

" Amended Complaint,

" Demurrer to Amended Complaint,

" Answer,

" Motions for Continuance and Affidavit in Opposition thereto,

" Motion to set cause for trial,

" Clerk's Minutes,

Original Exhibits:

Copy Subpœna issued by plaintiff for witness J. F. Colburn,

" Instructions requested,

" Verdict,

" Clerk's Minutes showing proceedings while jury deliberating,

" Motion for Judgment non obstante veredicto,

" Motion for New Trial,

" Judgment,

1357 Original Transcript of Evidence

" Bill of Exceptions.

WILLIAM WATERHOUSE AND
ALBERT WATERHOUSE,

*Executors under the Will and of the Estate of Henry
Waterhouse, Deceased, Defendants,*

By SMITH & LEWIS,

CASTLE AND WITHINGTON,

JNO. W. CATHCART,

Their Attorneys.

Dated Honolulu, November 13th, 1908.

Endorsed: L. 6023. In the Circuit Court, First Judicial Circuit, Territory of Hawaii. William W. Bierce, Limited, Plaintiff, vs. Clinton J. Hutchins, Trustee, etc. et al. Defendants. Præcipe. Castle & Withington, Smith & Lewis and Jno. W. Cathcart, Attorneys for Defendants. Filed Nov. 14, 1908, at 11:15 o'clock A. M. ———, Clerk.

1358 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee; ARTHUR B. WOOD, and WILLIAM Waterhouse, and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants.

Assumpsit.

Clerk's Certificate to Transcript of Record.

TERRITORY OF HAWAII,

Honolulu, Oahu, ss:

I, J. A. Thompson, Clerk of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, in pursuance of the Præcipe to me directed and filed in the above entitled cause, a copy of which is hereto attached being pages 124-125 of this Transcript, do hereby certify, that the foregoing documents (being pages numbered from 1 to 113 both inclusive and page 123) together with the indorsements thereon and enumerated hereunder, to wit:

1. Plaintiff's Bill of Complaint, annexed thereto as Exhibit "A" thereof, is Copy of Return Bond.

2. Plea in Abatement of William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased to the Bill of Complaint.

3. Amended Bill of Complaint, annexed thereto as Exhibit "A" thereof is Copy of Return Bond.

4. Demurrer of William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased to the Amended Bill of Complaint.

5. Answer of William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased to Amended Bill of Complaint.

6. Motion by Plaintiff for continuance, filed January 3, 1906 annexed thereto is the affidavit of A. G. M. Robertson.

7. Motion by Plaintiff for continuance, filed April 4, 1906, annexed thereto is the affidavit of A. G. M. Robertson.

8. Affidavit of A. Lewis Jr., in opposition to the Motion for continuance.

9. Notice of Motion by Defendants to set cause for trial filed September 4, 1906

- 1359 10. Instructions Requested by Plaintiff,
 11. Instructions Requested by defendants William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased,
 12. Verdict,
 13. Motion by defendants for judgment *non obstante veredicto*,
 14. Motion by defendants William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased for a New Trial,
 15. Judgment,
 And 16. Subpœna issued for John F. Colburn and Return of Service thereof,

are full true and correct copies of the originals thereof which are now on file in the Clerk's Office of said Circuit Court in the foregoing entitled cause (Law Division Number 6023).

I do further certify that the foregoing pages numbered from 114 to 122 both inclusive, are true and correct extracts of the Clerk's Minutes of the Circuit Court of the First Circuit as transcribed from the volumes and pages noted on the margins of the transcript herein of such minutes.

Witness my hand and the Seal of said Circuit Court, at Honolulu, Oahu, this 21st day of November, A. D. 1908,

[SEAL.]

(Signed) J. A. THOMPSON,
 Clerk Circuit Court of the First Judicial
 Circuit, Territory of Hawaii.

Endorsed: No. 383. Supreme Court, Territory of Hawaii, Oct. Term 1908. William W. Bierce, Ltd., Plaintiff-Appellee v. Clinton J. Hutchins, Trustee, Arthur B. Wood, and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Est. of Henry Waterhouse, deceased, Defendants-Appellants. Transcript of Record on Exceptions from Circuit Court, First Circuit. Filed December 16, 1908, at 2:15 o'clock P. M.. J. A. Thompson, Clerk.

1360 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

WILLIAM W. BIERCE, LIMITED,

v.

CLINTON J. HUTCHINS, Trustee.

Replevin.

Judgment.

Now on the 6th day of May, 1905, the same being one of the regular days of the October 1904 Term of said Court, the above cause coming on for further consideration on the plaintiff's motion for a modification of the original decision herein made and filed on January 28, 1905, so as to direct that the above cause be remanded to

the Circuit Court of the First Circuit with directions to enter judgment for the defendant with costs, and said motion having been granted, and said order having been entered on this date.

Now therefore it is considered by the Court and is now ordered and adjudged that the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in favor of the plaintiff for the return of the property in controversy in the above cause, or in case the same should not be returned, for the value thereof, found to be the sum of \$22,000.00 and interest thereon, be and the same is hereby reversed, and the exceptions, in so far as they raise the question of election, are sustained, and the said cause is hereby remanded to the said Circuit Court with directions to enter judgment for the defendant with costs.

Entered this 6th day of May, A. D. 1905.

By the Court:

(Signed)

GEORGE LUCAS,

Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed: No. —. Supreme Court, Territory of Hawaii. Wm. W. Bierce, Ltd. vs. Clinton J. Hutchins. Judgment. Filed May 6th, 1905, at — M. George Lucas, Clerk. Kinney, McClanahan & Cooper, 303-305 Judd Bldg., Honolulu. Attorneys for — — —. (Office No. —.)

1361 Supreme Court of the United States.

No. 14, Original, October Term, 1905.

Ex Parte in the Matter of WILLIAM W. BIERCE, LIMITED,
Petitioner.

On consideration of the Motion for leave to file the Petition for Writs of Mandamus or Certiorari herein,

It is now here ordered by the Court that said motion be, and the same is hereby, granted, and on consideration of the petition and of the record presented therewith it is ordered that an appeal from the judgment of the Supreme Court of the Territory of Hawaii in the case of William W. Bierce, Limited, a corporation, vs. Clinton J. Hutchins, Trustee, be, and the same is hereby, allowed on the appellant giving bond in the penal sum of \$1,000, conditioned according to law, and approved by the Chief Justice of said Supreme Court or an Associate Justice thereof.

DECEMBER 4, 1905.

A true copy.

Test:

[SEAL.]

(Signed) JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Indorsement: Supreme Court of the United States, October Term, 1905. Term No. 14. Original. Order Allowing Appeal. Filed Dec. 4th, 1905. Filed January 13, 1906. George Lucas, Clerk.

1362

(\$1.00 Stamp.)

Know all men by these presents, That we, William W. Bierce, Limited, a corporation, as principal, and Pacific Surety Company, of California, as sureties, are held and firmly bound unto Clinton J. Hutchins, Trustee, in the full and just sum of One Thousand dollars, to be paid to the said Clinton J. Hutchins, Trustee, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this thirteenth day of January, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Supreme Court of the Territory of Hawaii in a suit depending in said Court, between William W. Bierce, Limited, a corporation, plaintiff, and Clinton J. Hutchins, Trustee, defendant, a judgment was rendered against the said plaintiff and the said plaintiff having obtained an appeal [and filed a copy thereof in the Clerk's office of the said Court]* to reverse the judgment in the aforesaid suit, and a citation directed to the said Clinton J. Hutchins, Trustee, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date thereof.

Now, the condition of the above obligation is such, That if the said William W. Bierce, Limited, a corporation, shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM W. BIERCE, LIMITED,

(Signed) By COLUMBUS BIERCE,

Vice-President. [SEAL.]

Attest:

(Signed) E. W. HOLDEN,

Sec'y & Treas. [SEAL.]

(Signed) PACIFIC SURETY COMPANY,

(Signed) By H. B. MARRINER,

Attorney in Fact. [SEAL.]

Sealed and delivered in presence of—

(Signed) A. K. Y. YAP.

(Signed) A. G. M. ROBERTSON.

1363 Approved by:

(Signed)

W. F. FREAR,

Chief [Associate] Justice of the Supreme Court
of the [United States]* Territory of Hawaii.*

Indorsement: Supreme Court, Territory of Hawaii. William W. Bierce, Ltd. vs. Clinton J. Hutchins. Bond. Filed January 13, 1906. George Lucas, Clerk.

[* Words enclosed in brackets erased in copy.]

1364

Supreme Court of the United States.

No. 607, October Term, 1905.

WILLIAM W. BIERCE, LIMITED, Appellant,

vs.

CLINTON J. HUTCHINS, Trustee.

On consideration of the Motion for a Supersedeas in this cause,
It is now here ordered by the Court that the bond heretofore given
herein operate as a supersedeas and that the judgment be superseded
accordingly.

MARCH 5, 1906.

A true copy.

Test:

[SEAL.]

(Signed) JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Indorsement: File No. 20,109. Supreme Court of the United
States. October Term, 1905. Term No. 607. Order. Filed Mar.
5, 1906. Filed March 23, 1906. George Lucas, Clerk.

1365 Office Supreme Court U. S. Filed Feb. 28, 1906. James H.
McKenney, Clerk.

Supreme Court of the United States, October Term, A. D. 1905.

No. 607.

WILLIAM W. BIERCE, LIMITED, Appellant,

vs.

CLINTON J. HUTCHINS, Appellee.

Motion for Writ of Supersedeas.

Now comes the appellant, by Charles H. Aldrich, its colicitor, and
moves the court that a writ of supersedeas issue herein, and that the
bond heretofore given in said cause and shown at pages 350-351 of
the printed record stand as the bond upon said supersedeas; and in
support of said motion the appellant suggests:

First. That the appellee or those in privity with him have the
possession of the property in controversy, and such supersedeas will
in nowise affect the possession or control of said property.

Second. That such supersedeas is necessary to preserve the rights
of the appellant against the sureties upon the bond given to the
sheriff upon the seizure of the property.

And in support of such motion the appellant files herewith and
makes a part hereof the affidavit of William W. Bierce, bearing date
the twenty fourth day of February, A. D. 1906.

CHARLES H. ALDRICH.

Solicitor for Appellant.

1366 In the Supreme Court of the United States, October Term,
A. D. 1905.

WILLIAM W. BIERCE, LIMITED, Appellant,

vs.

CLINTON J. HUTCHINS, Trustee, Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

UNITED STATES OF AMERICA,

District of —, ss:

William W. Bierce, being first duly sworn, says that he now resides in the city, county, and Territory of Oklahoma, and until on or about the 1st day of May, A. D. 1905, was the president of William W. Bierce, Limited, a corporation created and existing by virtue of the laws of the State of Louisiana, which is the appellant in the above entitled cause; that as such president he has heretofore had active personal charge of the business and transactions involved in said suit and out of which said cause arose, as well as of the prosecution of said cause in both the courts below; that he, this affiant, still has a substantial pecuniary interest in said corporation, its property and rights, and makes this affidavit in its behalf and in support of the application it is about to make as the appellant in said cause for an order of court awarding a writ of supersedeas in said cause commanding the justices of the supreme court of the Territory of Hawaii to stay all proceedings on the judgment of the said supreme court of the Territory of Hawaii in said cause pending said appeal.

Affiant further says that for convenience he hereinafter mentions the parties to said cause by the titles and according to the positions they occupied in the court below, said appellant, William W. Bierce, Limited, as plaintiff and said appellee, Clinton J. Hutchins, trustee, as defendant.

Affiant further says that the necessity for the issuance of such writ of supersedeas in said causes arises in the following manner—that is to say, that, as shown by the sheriff's return to process of replevin issued in said cause at the time of the beginning thereof, on or about the 20th day of July, A. D. 1903, which return bears date the 22d day of July, A. D. 1903, the property levied upon by said sheriff by virtue of said process and in controversy in said cause, consisting of three hundred and sixty-two tons of steel railroad rails, two railroad locomotives, sixteen cane cars, and other plantation railroad equipment and material, was released to said defendant by said sheriff from the levy of said process and returned to said defendant upon the filing by him of a written undertaking for double the supposed value of the property so levied upon, which said process and return are shown upon pages 61 to 65, both inclusive, of the original transcript of the record in said cause filed in this court and upon pages 45 to 47, both inclusive, of the printed transcript of said record filed in this court.

That said undertaking mentioned in said sheriff's return is a so-

called return or redelivery bond in the sum of thirty thousand dollars (\$30,000.00) bearing date the 21st day of July A. D. 1903, made by said defendant, Clinton J. Hutchins, Trustee, as principal, and by Henry Waterhouse and Arthur B. Wood as sureties, and is conditioned for the delivery of all said property in controversy in said cause to said plaintiff, if such delivery be adjudged, and for the payment to said plaintiff of such sum as may for any cause be recovered against said defendant, and was filed in the circuit court in which said suit was begun on or about the 1st day of August, 1903, and still remains in the custody of said circuit court, and is shown on pages 66 and 67 of said original transcript and on pages 48 and 49 of said printed transcript.

That in the month of January and February A. D. 1904, affiant made a trip from his place of residence, in Oklahoma City aforesaid, to the city of Honolulu, in the island of Oahu, in said Territory, where he arrived on or about the 8th day of February, A. D. 1904, for the purpose, among others, of attending the trial of said cause as a witness on the part of said plaintiff, and on said trip remained in the city of Honolulu aforesaid about two months, or until on or about the 1st day of April, A. D. 1904; that while on said trip affiant was present at the trial of said cause in the circuit court of the first judicial circuit of said Territory, sitting at the city of Honolulu aforesaid, from about the 7th until the 12th day of March, A. D. 1904, and testified on said trial as a witness on the part of said plaintiff, and remained in the city of Honolulu aforesaid until some time after the entry of final judgment in said cause by said circuit court, on the 19th day of March, A. D. 1904, in favor of said plaintiff and against said defendant, as shown upon pages 425 to 428, both inclusive, of said original transcript and upon pages 273 to 275, both inclusive, of said printed transcript.

That in the month of May, A. D. 1904, after affiant's return from the City of Honolulu aforesaid to his place of residence, in Oklahoma City aforesaid, he was advised by letters received from counsel for said plaintiff residing in said city of Honolulu that said defendant had taken said cause up to the supreme court of said Territory for review by bill of exceptions in the nature of an appeal, for which

purpose said defendant had executed and filed in said circuit court a certain bond upon exceptions running to the clerk of the judiciary department of said Territory, in the sum of one thousand dollars (\$1,000.00) conditioned for the payment of court costs upon such exceptions in said cause in said supreme court, and further conditioned that the said defendant should not to the detriment of said plaintiff remove or otherwise dispose of any property he might have liable to execution on said judgment pending such exceptions, which said bond had been approved by said circuit court, and by virtue of the laws of said Territory operated as an arrest of judgment and stay of execution on said judgment, provided, however, that said circuit court might, upon good cause shown, allow execution to issue or other appropriate action to be taken for the enforcement of said judgment, and, further, the said counsel in behalf of said plaintiff had made application to said circuit court and

therein shown such cause, and thereby caused execution to issue on said judgment in said cause, and that said sheriff had attempted to levy said execution upon the property in controversy in said cause, but had been unable to take the same in execution thereunder, because said defendant had disposed of said property to third persons into whose possession the same had passed, and was also unable under said execution to make the moneys, or any part thereof, recovered by said plaintiff from said defendant by said judgment whereon said execution had been issued; wherefore said sheriff had returned said execution into said circuit court wholly unsatisfied.

That in the month of June, A. D. 1904, affiant was advised by letters received from counsel for said plaintiff residing in Honolulu that shortly prior to the 4th day of April, A. D. 1894, said Henry

Waterhouse, one of the sureties on said return or redelivery
1370 bond, had departed this life at the city of Honolulu aforesaid,

leaving an estate in said Territory of the estimated value of two hundred and forty thousand dollars (\$240,000.00) in excess of all debts and liabilities of said Waterhouse, and leaving a last will and testament, wherein he had nominated and appointed William Waterhouse and Albert Waterhouse executors thereof; that said will had been admitted to probate and letters testamentary issued thereon to said executors by the court of said Territory having jurisdiction in that behalf, and that in pursuance of the statutes of said Territory, said executors had, on the 4th day of April, A. D. 1904, published notice in a newspaper published in the city of Honolulu aforesaid to all creditors of said Henry Waterhouse, deceased, to present their claims, duly authenticated and with proper vouchers, to said executors within six months from the date of such publication; that, according to the provisions of the statutes of said Territory in that behalf, any claim against the estate of said Henry Waterhouse, deceased, must be presented to said executors within six months after the 4th day of April, A. D. 1904, and prior to the 4th day of October, A. D. 1904, or be forever barred by the statutes of said Territory, with an exception as to a claim not due, which must be so presented within six months after it fell due, or be forever barred by said statutes; that, in accordance with further provisions of said statutes, in the event of the rejection by said executors of a claim so presented, a suit must be brought thereon in the proper court of said Territory against said executors within two months after such rejection, or within two months after such claim should become due, or else it would be forever barred by said statutes; that thereupon affiant consulted other counsel for said plaintiff concerning the matter of the presentation to said executors of a claim by said plaintiff upon said return or redelivery bond, and the advisability
1371 of bringing suit against said executors thereon in the event of their rejection of such claim, and in the month of July, A. D. 1904, was advised by such other counsel that by reason of said plaintiff's exercise of its right under the statutes of said Territory to have execution issue on said judgment, and of the failure of said defendant to deliver the specific property in controversy in said cause to the plaintiff and of his failure to pay to the plaintiff the moneys

recovered against him by said judgment, the conditions of said return or redelivery bond had been broken and a cause of action thereon had accrued to said plaintiff against the principal and surviving surety thereon, as well as against said executors of Henry Waterhouse, the deceased surety thereon, and that unless said plaintiff should present its claim for damages on said bond for such breach or breaches thereof the said executors within six months from the 4th day of April, A. D. 1904, and, in the event of the rejection of such claim by said executors, bring suit thereon against them within two months after such rejection, such claim and cause of action would be forever barred by the statute of limitations of said Territory as against said executors and the estate of said Henry Waterhouse, deceased; that thereafter, and on or about the 1st day of August, A. D. 1904, affiant, as the president of said plaintiff corporation, by letter mailed to said counsel for said plaintiff residing in the city of Honolulu aforesaid, requested and instructed said counsel at once to present to the said executors said plaintiff's claim on said bond, and in the event of the rejection thereof by said executors immediately to bring suit thereon in the name and behalf of said William W. Bierce, Limited, against said executors and the surviving obligors on said bond, and that some time thereafter affiant was duly advised by letters received from said counsel that

1372 they had presented such claim in due form to said executors on the 30th day of September, A. D. 1904, that said executors had rejected the same, and that they, said counsel, thereupon, and on or about the 11th day of October, A. D. 1904, and within the time limited for that purpose by said statutes of said Territory, had begun an action of assumpsit on said bond in the circuit court of the first judicial circuit of said Territory in the name and in behalf of said William W. Bierce, Limited, against said Clinton J. Hutchins, trustee; Arthur B. Wood and William Waterhouse and Albert Waterhouse, as executors of the last will and testament of said Henry Waterhouse, deceased, for the recovery of the plaintiff's damages for breach of the condition of said bond or for the value of said property assessed at the sum of twenty two thousand dollars (\$22,000.00) and recovered against said defendant, Clinton J. Hutchins, trustee, in and by said judgment with interest thereon from the 19th day of March, A. D. 1904, and that thereafter such proceedings were duly taken and had in said action on said bond that by the service of process and by the voluntary entry of their appearance therein jurisdiction was duly acquired of the persons of the defendants therein by said circuit court, and that of *all* said defendants duly appeared in said action on said bond in said circuit court and filed therein their formal answers to the plaintiff's complaint therein, traversing the averments thereof and denying their liability in said action.

That since the property in controversy in the above-entitled cause was released to said defendant by said sheriff from the levy of said process of replevin and returned to said defendant, on or about the 22d day of July, A. D. 1903, as aforesaid, none of said property has

been returned or delivered to said plaintiff or to any one representing it, nor has the value of said property assessed and recovered by said judgment to the amount of twenty-two thousand dollars 1373 (\$22,000.00), or any part thereof, ever been paid to said plaintiff or to any one representing it.

That during affiant's said trip to the city of Honolulu aforesaid he met and became personally acquainted with said defendant, Clinton J. Hutchins, trustee, and became personally familiar with his financial standing and condition, and that on numerous occasions since said trip affiant has been advised by letters received from counsel for said plaintiff residing at the city of Honolulu aforesaid respecting the financial standing and condition of said defendant Hutchins, as well as respecting the property and financial condition of said surviving surety, Arthur B. Wood, and that affiant is thereby informed and believes that said defendant, Clinton J. Hutchins, trustee, is a person of little or no financial responsibility and of doubtful solvency, and has no property situated within the Territory of Hawaii or elsewhere out of which said judgment for the value of said property, or any considerable portion thereof, could be collected by execution or otherwise, and that said surviving surety, Arthur B. Wood, is likewise a person of little or no financial responsibility and of doubtful solvency, and has no property situated within the Territory of Hawaii or elsewhere out of which said judgment for the value of said property, or any considerable portion thereof, could be collected by execution or otherwise, and that said Wood, prior to the month of April, A. D. 1904, permanently removed from said Territory of Hawaii, and also removed therefrom and otherwise disposed of all of his property previously situated within said Territory, and took up a new residence in some place without said Territory, but that affiant by making diligent search and inquiry for that purpose has been unable to learn the present place of residence of 1374 said Wood or what property, if any, he owns without said Territory, and that the only effectual recourse said plaintiff now has for the recovery of the value of said property is against said executors and estate of said Henry Waterhouse, deceased, in said action on said return or redelivery bond, which said action is still pending and undetermined in said Circuit Court.

Affiant further says that he has been lately advised by counsel for said plaintiff residing at Honolulu that when said action on said bond was reached on the call of the trial calendar of said circuit court, at the beginning of the last January term thereof, the defendants in said action, by their counsel, opposed said plaintiff's application for a continuance thereof, but that said circuit court nevertheless ordered said cause to be continued until the next April term thereof, beginning on the 2d day of April, A. D. 1906, but has since allowed said defendants an interlocutory bill of exceptions from such order of continuance to the supreme court of said Territory, whereon they are seeking a review of such order of continuance in said supreme court, with directions to said circuit court to proceed to try said cause at said next April term thereof, which trial, if forced by the action of said territorial courts pending said

appeal, could only result in a judgment in favor of the defendants in said action on said bond and against said plaintiff or in a judgment of dismissal or nonsuit, and that in the event said action on said bond should be so disposed of by said circuit court a new action on said bond for the value of said property could not be maintained against said executors, the bar of said statute of limitations having long since become complete against the maintenance of such new action, and that in such event the further prosecution of said appeal, even although the same should result in a decision and judgment by this honorable Supreme Court of the United States reversing the judgment of the supreme court of said Territory in said cause and affirming the judgment of said circuit court in said cause, would nevertheless be ineffectual and idle, and wholly fruitless to said appellant.

And further affiant saith not.

WM. W. BIERCE.

Subscribed and sworn to before me this 24th day of February, A. D. 1906.

MARION L. SPITLER,
United States Commissioner.

UNITED STATES OF AMERICA,
Territory of Oklahoma, ss:

I, B. D. Shear, the duly appointed, qualified, and acting clerk of the district court for the third judicial district of Oklahoma Territory, do hereby certify that the Honorable B. F. Burwell, judge of said court, did on the 18th day of May, A. D. 1903, appoint Marion L. Spitler a United States commissioner in and for said district.

I further certify that on the said 18th day of May, A. D. 1903, the said Marion L. Spitler, appointed as aforesaid, did duly qualify, take the oath of office and assume the duties of said office; that said appointment so made has never been suspended or revoked, and that the said Marion L. Spitler is now and has been ever since said 18th day of May, A. D. 1903 the duly appointed, qualified, and acting United States commissioner in and for said district.

Witness my official signature and the seal of said court this 24th day of February, A. D. 1906.

[Seal District Court, Territory of Oklahoma.]

B. D. SHEAR,
Clerk of said Court.
ANNE HOOVER,
Deputy Clerk.

1376 Supreme Court of the United States, October Term, 1905.

No. 607.

WILLIAM W. BIERCE, LIMITED, Appellant,

vs.

CLINTON J. HUTCHINS, Trustee.

On consideration of the motion for a supersedeas in this cause,

It is now here ordered by the court that the bond heretofore given herein operate as a supersedeas and that the judgment be superseded accordingly.

March 5, 1906.

Indorsement: File No. —. Supreme Court of the United States, October Term, 190—. Term No. —. Filed — —, 190—.

Supreme Court of the United States.

I, James H. McKenney, Clerk of the Supreme Court of the United States do hereby certify that the foregoing pages numbered from one to twelve, inclusive, contain true copies of the Motion for a writ of supersedeas and affidavit in support thereof and of the order of said Supreme Court entered thereon in the case of William W. Bierce, Limited, Appellant, vs. Clinton J. Hutchins, Trustee, No. 607 October Term, 1905, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this 10th day of March, A. D. 1906.

[SEAL.]

(Signed)

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

1377

Assignment of Errors.

In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Appellant,

vs.

CLINTON J. HUTCHINS, Trustee, Appellee.

And now comes the appellant, William W. Bierce, Limited, a corporation, by Charles H. Aldrich, Henry S. McAuley, Henry W. Prouty and A. G. M. Robertson, its attorneys, and upon the allowance of its appeal herein to the Supreme Court of the United States, presents and files herein its assignment of errors, as to which matters and things it says that in the record and proceedings aforesaid of said Supreme Court of the Territory of Hawaii in the above entitled cause, wherein William W. Bierce, Limited, was plaintiff and Clinton J. Hutchins, Trustee, was defendant, and in the rendi-

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tion of the final judgment therein, manifest error has intervened to the great prejudice and injury of said William W. Bierce, Limited, in the following, among other things, to-wit:

First. Said Supreme Court of the Territory of Hawaii erred in entering judgment in said cause reversing the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of said appellant for the return of the property in controversy in said cause, or in case the same should not be returned, for the value thereof, found to be the sum of Twenty-two Thousand Dollars (\$22,000.00) and interest thereon, and sustaining the exceptions of said appellee in so far as they raised the question of election.

Second. Said Supreme Court of the Territory of Hawaii 1378 erred in not affirming in all things the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of said appellant and against said appellee for the return of the property in controversy in said cause into the possession of said appellant, and for the sum of One Thousand and Forty-five Dollars (\$1045.00) damages for the detention of said property, together with costs of suit taxed at the sum of Fifty Dollars and Fifty Cents (\$50.50), or in the alternative, in case said property should not be so returned, for the value thereof found and adjudged to be the sum of Twenty-two Thousand Dollars (\$22,000.00) and for the sum of One Thousand and Forty-five Dollars (\$1045.00) damages for the detention thereof, together with costs of suit taxed at the sum of Fifty Dollars and Fifty Cents (\$50.50).

Third. Said Supreme Court of the Territory of Hawaii erred in sustaining the exceptions of said appellee, and each of them in said cause, in so far as such exceptions raised the question of an election by said appellant between inconsistent remedies, or between inconsistent remedial rights.

Fourth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-second exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-second exception is in the words and figures as follows to-wit:

"Immediately thereafter plaintiff proposed the following finding:

"That the contract of March 13th, 1901, was an entire contract and intended so to be, for a lump sum consideration which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and non-lienable items thereof; to which finding the defendant objected as follows:

"Defendant objects to the 6th proposed finding of fact upon the ground that said so-called finding contains mixed questions of law and fact, and upon the further ground that the evidence in said cause shows that the said contract of March 13th, 1901, was not an entire contract, nor intended so to be, but was a contract supplementary to the contract of February 21st, 1900.

1379 "The Court then and there overruled said objection to which ruling of the court said defendant then and there duly

excepted and said ruling is here and now assigned as error by said defendant."

Fifth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-seventh exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-seventh exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action; to which findings the defendant objected as follows:

"Defendant objects to the 11th proposed finding of fact upon the ground that the same contains mixed questions of law and fact, and upon the further ground that the same is not supported by the evidence in said action.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Sixth. Said Supreme Court of the Territory of Hawaii erred in sustaining the twenty-eighth exception of said appellee to the finding of said Circuit Court in said cause, which said twenty-eighth exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following finding:

"That plaintiff did not intend to and did not in fact waive its title by bringing the action to enforce a material-man's lien against the Kona Sugar Company, Limited, and its Receiver; to which finding the defendant objected as follows:

"Defendant objects to the 12th proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Seventh. Said Supreme Court of the Territory of Hawaii erred in sustaining the fortieth exception of said appellee to the conclusion of law of said Circuit Court in said cause, which said fortieth 1380 exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following conclusion of law:

"That the contract of March 13th, 1901, was an entire contract for a lump sum consideration and contained lienable and nonlienable items; to which conclusion the defendant objected as follows:

"Defendant objects to the 6th proposed conclusion of law upon the ground that the same is not supported by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling of the court is here and now assigned as error by said defendant."

Eighth. Said Supreme Court of the Territory of Hawaii erred in sustaining the forty-first exception of said appellee to the conclusion

of law of said Circuit Court in said cause, which said forty-first exception is in the words and figures as follows, to-wit:

"Immediately thereafter plaintiff proposed the following conclusion of law:

"That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action; to which conclusion the defendant objected as follows:

"Defendant objects to the 7th proposed conclusion of law upon the ground that the same is not supported by any finding of fact herein, nor by the evidence in said action, and is contrary to law.

"The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant."

Ninth. Said Supreme Court of the Territory of Hawaii erred in ruling that said appellant was estopped from maintaining said action of replevin for the property in controversy in said cause, for the reason that said appellant had previously elected to pursue a remedy inconsistent therewith, namely, by bringing the action for the price of said property and to enforce a materialman's lien for the same.

Tenth. Said Supreme Court of the Territory of Hawaii erred in ruling that by bringing the action to enforce a materialman's lien for the price of the property in controversy in said cause, said appellant made a binding election to waive performance of the

1381 condition precedent reserved to it in the contract of March 13th, 1901, between said appellant and The Kona Sugar Company, Limited, in pursuance of which said property was delivered to said sugar company, namely, payment in full of the promissory note in controversy in said cause, and to treat the title to said property as in said The Kona Sugar Company, Limited, or the receiver thereof, such as to preclude said appellant from maintaining said action of replevin for the possession of said property.

Eleventh. Said Supreme Court of the Territory of Hawaii erred in holding and construing said conditional sale contract of March 13th, 1901, in controversy in said cause, to be a severable contract and not an entire contract such as to prevent a severance of the price of the lienable items from the price of the nonlienable items of the property or materials in controversy in said cause.

Twelfth. Said Supreme Court of the Territory of Hawaii erred in not holding that said appellant had no right to maintain the materialman's lien proceedings, and that its attempt to exercise such nonexistent right was a mistake of remedy made in ignorance of its legal rights, and as such did not amount to an election between inconsistent remedies or remedial rights, such as to preclude said appellant from maintaining said action of replevin for the property in controversy in said cause.

Thirteenth. Said Supreme Court of the Territory of Hawaii erred in not holding that the special findings of fact by said Circuit Court were sufficient to sustain the said judgment of said Circuit Court.

Fourteenth. Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said appellee to the

entering of said judgment by said Circuit Court in said cause
1382 which were sustained by the said Supreme Court.

Fifteenth. Said Supreme Court of the Territory of Hawaii erred in sustaining each and every of the exceptions of said appellee to the rulings of said Circuit Court in said cause which were sustained by said Supreme Court.

Sixteenth. Said Supreme Court of the Territory of Hawaii erred in denying the petition of said appellant for a rehearing in said cause.

Wherefore, the said William W. Bierce, Limited, Appellant, prays that for the errors aforesaid and other errors appearing in the record of said Supreme Court of the Territory of Hawaii in the above entitled cause to the prejudice of said appellant the said judgment of the said Supreme Court of the Territory of Hawaii be reversed, annulled, and for naught esteemed, and that the said judgment of the said Circuit Court of the First Judicial Circuit, of the Territory of Hawaii be in all things affirmed, etc., to the end that justice may be done in the premises.

(Signed)

(Signed)

(Signed)

(Signed)

CHARLES H. ALDRICH,

HENRY S. McAULEY,

HENRY W. PROUTY,

A. G. M. ROBERTSON,

Attorneys for Appellant.

Indorsement: Supreme Court Territory of Hawaii. William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee. Assignment of Errors. Filed January 13, 1906. George Lucas, Clerk.

1383 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable
the Judges of the Supreme Court of the [United
[SEAL.] States for the]* Territory [District]* of Hawaii,
Greeting:

Whereas, lately in the Supreme Court of the [United States for the]* Territory [District]* of Hawaii before you or some of you, in a cause between William W. Bierce, Limited, plaintiff, and Clinton J. Hutchins, Trustee, defendant, wherein the decree of the said Supreme Court, entered in said cause on the 6th day of May, A. D. 1905, is in the following words, viz:

"Now on this 6th day of May, 1905, the same being one of the regular court days of the October Term of said Court, the above cause coming on for further consideration on the plaintiff's motion for a modification of the original decision herein made and filed on January 28, 1905, so as to direct that the above cause be remanded to the Circuit Court of the First Circuit with directions to enter judgment for the defendant with costs, and said motion having been granted, and said order having been entered on this date.

Now therefore it is considered by the Court and is now ordered and adjudged that the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in favor of the plaintiff for the return of the property in controversy in the above cause, or in case the same should not be returned, for the value thereof, found to be the sum of \$22,000.00 and interest thereon, be and the same is hereby reversed, and the exceptions, in so far as they raise the question of election, are sustained, and the said cause is hereby remanded to the said Circuit Court with directions to enter judgment for the defendant with costs.

Entered this 6th day of May, A. D. 1905.

By the Court.

(Signed)

GEORGE LUCAS,

Clerk of the Supreme Court of the Territory of Hawaii."

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year 1384 of our Lord one thousand nine hundred and six, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby reversed with costs; and that the said plaintiff, William W. Bierce, Limited, recover against the said defendant Five Hundred and eighteen dollars and fifty-seven cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings in conformity with the opinion of this Court.

April 8, 1907.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of May, in the year of our Lord one thousand nine hundred and seven.

(Signed)

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Costs of plaintiff:

Clerk	\$223.15
Printing Record	\$275.42
Attorney	\$20.00

\$518.57

1385 Supreme Court of the United States, October Term, 1906.

Costs of William W. Bierce, Limited, in No. 212.

1905 October Term—Docketing cause and filing record, \$5.00; appearance, .25; filing preceipe and receipts .75; filing papers, \$3.25; filing motion, .25; [filing briefs, \$5.00;]* submission .20; order, .20; continuance, .25.	\$10.15
1906 October Term—Transfer, \$1.00; appearance, .25; filing preceipe [and receipt],* .25; filing papers, \$4.25; filing briefs, \$5.00; argument, .20; [submission, .20;]* judgment, \$1.00; filing same, .25; recording, .40; mandate, \$5.00; preparing record for printer, etc., \$195.00; cost of printing record, \$275.42; attorney's docket fee, \$20.00; costs and copy, .40;.....	508.42
	<u>\$518.57</u>

Fee Book, page 20,109.

Test:

(Signed)

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Indorsements: File No. 20,109. Supreme Court of the United States No. 212, October Term, 1906. William W. Bierce, Limited, vs. Clinton J. Hutchins, Trustee. Mandate. Filed August 16, 1907, at 9:55 o'clock A. M. J. A. Thompson, Clerk. In the Supreme Court of the Territory of Hawaii. William W. Bierce, Limited vs. Clinton J. Hutchins, Tr.

1386 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,

vs.

CLINTON J. HUTCHINS, Trustee, Defendant.

Order.

Whereas, in the above entitled cause, upon the plaintiff's appeal to the Supreme Court of the United States from the judgment of this Court heretofore made and entered herein, in and by which the judgment of the Circuit Court of the First Judicial Circuit was reversed, said Supreme Court did, on the 8th day of April, 1907, render its opinion and issue its mandate reversing the judgment of this Court, with costs, and remanding said cause to this Court for further proceedings in conformity with said opinion:

Now therefore, it is hereby ordered and adjudged that the judg-

[* Words and figures enclosed in brackets erased in copy.]

ment made and entered in this Court and cause on the 6th day of May, 1905, be and the same is vacated and set aside.

It is further ordered and adjudged that the plaintiff, William W. Bierce, Limited, recover from and against the said defendant, its costs as taxed in the Supreme Court of the United States amounting to the sum of \$518.57, and also its costs herein expended, taxed at \$230.00.

It is also ordered that said cause be placed on the calendar for the October 1907 Term for further proceedings.

Dated, Honolulu, September 27th, 1907.

By the Court:

(Signed)

[SEAL.]

J. A. THOMPSON, *Clerk.*

H.

Indorsement: Supreme Court Territory of Hawaii. William W. Bierce, Ltd. v. Clinton J. Hutchins, Trustee. Order. Filed September 27, 1907, at 11:45 A. M. J. A. Thompson, Clerk.

O. K.

C. & W.

1387 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff-Appellee,
vs.

CLINTON J. HUTCHINS, Trustee, Defendant-Appellant.

Exceptions from Circuit Court, First Circuit.

Decision on Exceptions.

In the above entitled cause, the defendant's exceptions are overruled, pursuant to the opinion of said Court filed herein December 20, 1907.

Dated, Honolulu, March 4th, 1908.

By the Court:

(Signed)

J. A. THOMPSON,

Clerk Supreme Court.

H.

Indorsement: Supreme Court Territory of Hawaii. October Term 1907. William W. Bierce, Limited, Plaintiff-Appellee, v. Clinton J. Hutchins, Trustee, Defendant Appellant. Decision on Exceptions. Filed March 4th, 1908, at 11:10 o'clock a. m. J. A. Thompson, Clerk.

1388 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff-Appellee,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant-Appellant.

Exceptions from Circuit Court, First Circuit.

Notice of Decision on Exceptions.

To the Honorable J. T. De Bolt, First Judge, Circuit Court, First Circuit:

You are hereby notified that in the above entitled cause the Supreme Court has made the following decision:

"Decision on Exceptions.

"In the above entitled cause, the defendant's exceptions are over-ruled, pursuant to the opinion of said court filed herein December 20, 1907."

Honolulu [February]* March 4th, 1908.

By the court:

(Signed)

[SEAL.]

J. A. THOMPSON,
Clerk Supreme Court.

Indorsement: Supreme Court Territory of Hawaii October Term 1907. William W. Bierce, Limited, Appellee v. Clinton J. Hutchins, Trustee, Appellant. Notice of Decision on Exceptions. Filed March 4, 1908, at 11:10 o'clock A. M. J. A. Thompson, Clerk.

1389 In the Supreme Court of the United States.

WILLIAM W. BIERCE, LIMITED, a Corporation, Appellee,
vs.
CLINTON J. HUTCHINS, Trustee, Appellant.

Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes Clinton J. Hutchins, Trustee, Appellant in the above entitled action, and says that in the record of the proceedings in the said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:

1. That said Supreme Court of the Territory of Hawaii erred in overruling appellant's exceptions and in affirming the judgment

[* Words enclosed in brackets erased in copy.]

rendered in said cause by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, against said appellant for the return of the property in controversy in said cause, or, in case the same should not be returned, the value thereof, found to be in the sum of \$22,000, and interest thereon.

2. That said court erred in denying appellant's petition for rehearing, and in refusing and failing to pass upon the several grounds set forth in said petition.

3. That there was error in holding that the findings are supported by undisputed evidence in so far as they are findings of material facts and not statements of legal conclusions or immaterial facts varying and contradicting written instruments.

4. That there was error in holding that the findings are supported by undisputed evidence in this: That the Supreme Court of 1390 Hawaii, on the 28th day of January, 1905 (16 Haw. 418), decided by its opinion that day rendered that the said findings were not sustained according to the uncontradicted evidence in the case and that at the time of this decision the Supreme Court of Hawaii was the court of last resort for the case, as no federal question was involved, and that said decision became the law of the case and was binding upon all parties.

5. That there was error in holding that upon these facts so found the decision of the Supreme Court of the United States rendered in this action is conclusive against the defendant's contention, and in refusing to consider other facts in the case appearing in the evidence, which facts are decisive in favor of the defendant's contention.

6. That there was error in holding that each and every one of the findings of fact is sustained by the evidence, and particularly that the 6th finding of fact is sustained by the evidence, viz., that the contract of March 13, 1901, was an entire contract and intended so to be for a lump sum consideration, which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of lienable and nonlienable items thereof; and also the 4th and 6th conclusions of law are well taken, that the payment of \$10,000, the giving of the note secured by bonds of the Kona Sugar Company was not had or given as a consideration for the purchase price of the material sued for, and that the contract of March 13, 1901, was an entire contract for a lump sum consideration, particularly in view of the fact that said court had, upon the 28th day of January, 1905, decided that said findings were not sustained by the evidence and were erroneous, which findings became the law of the case and conclusive on the parties.

7. That the court erred in holding that what the parties intended the written instrument of March 13, 1901, to be is plainly immaterial.

1391 8. That the court erred in holding that the findings of the trial court are not open to dispute in any event, and not, as contended, that they were not open to dispute in the Supreme Court of the United States, for the reason that they had been adopted for the purpose of the case by the Supreme Court of the Territory of Hawaii, and that this is a misconstruction of the opinion of the Su-

preme Court of the United States, since that court cannot go into the evidence but must take the ultimate facts found by the Supreme Court of the Territory of Hawaii, while the Supreme Court of Hawaii has the right to determine whether the evidence supports the findings.

9. That the court erred in overruling the exception of this defendant to the judgment as contrary to the law and the evidence and the weight of the evidence, on the ground that the court had no authority to render an alternative judgment or money judgment in an action of this character; and on the further ground that the judgment should show the separate value of the different articles sued for in order that the defendant might return any portion of said articles that he was able to return.

10. That the court erred in overruling the last named exception of this defendant, on the further ground that the entry of the judgment was contrary to the law and the evidence and the weight of the evidence, since the evidence showed that there was another action pending for the same property, viz., an action in intervention to recover the value of the same out of the proceeds of sale.

11. That the court erred in overruling said last named exception of this defendant to the entry of the judgment as contrary to the law and the evidence and the weight of the evidence, since the
1392 evidence showed that this respondent acquired his title at a receiver's sale ordered for the purpose of paying the expenses of a receivership, which receivership was carried on under the direction and for the benefit and at the request of the plaintiff, and, further, for the payment of mortgage bonds secured upon this property, with the knowledge and concurrence of the plaintiff, as to the holders of which bonds the plaintiff was estopped to make any claim to the property or the proceeds.

12. That the court erred in overruling said last named exception of this defendant to the entry of the judgment as contrary to the law and the evidence and the weight of the evidence, since the evidence showed that the plaintiff waived its right to re-take said property or to make any claim thereto as against this defendant, the successor in interest to said Receiver, his creditors and said bondholders, as well as said Kona Sugar Company, Limited.

13. That the court erred in overruling the exception of this defendant to the amendment made March 7, 1904, since that amendment changed the character of the action and increased the *ad damnum* from \$15,000 to \$20,000, materially changing the liability of this defendant and his rights and obligations under the bonds given in said action, and also materially changing the claim of the plaintiff subsequently to the property being re-taken on a re-delivery bond.

14. That the court erred in overruling the exception to the finding of the court below that the actual value of the articles sued for was at the time of bringing the action and at the time of judgment the sum of \$22,000, on the ground that the said sum was in excess of the amount actually claimed by the plaintiff in the complaint and affidavit; and on the further ground that the finding did not set out

1393 the separate value of each different article comprising the property referred to in said finding; and further erred in connection with making said finding in amending the complaint increasing the amount claimed from \$20,000 to \$22,000 in order to conform with the proof over the objection and exception of this defendant.

15. That the court erred in overruling the exception of this defendant to the ruling of the court below in excluding the evidence of the witness M. F. Scott as to the condition of the railway material, and to the exclusion of the evidence of said witness upon the difference in the appearance and condition of the rails and the engines and whether the engines worked less well now than on the day when defendant took possession; and also in striking out the evidence of said witness that, with certain exceptions, the material and equipment was in good working order at the time of the trial.

16. That the court erred in overruling the exception of this defendant to the 4th finding of fact in the Circuit Court, on the ground that the same was not in accordance with the uncontradicted evidence; and on the further ground that at the hearing of this cause in the Supreme Court of the Territory of Hawaii on January 28, 1905, it was determined that said finding was not in accordance with the evidence, which was a final determination and not subject to appeal to this court.

17. That the court erred in overruling the exception of this defendant to the 6th finding of fact, on the ground that the contract of March 13, 1901, was not an entire contract, nor intended to be, but was a contract supplementary to the contract of February 21, 1900; and, further, that the said Supreme Court of the Territory of Hawaii, on the 28th day of January, 1905, finally determined that said 6th finding of fact was not in accordance with the uncontradicted evidence, which determination was not subject to review by this court.

1394 18. That the court erred in overruling the exception of this defendant to the 11th finding of fact, on the ground that the same was not supported by the uncontradicted evidence in the action; and, further, that this was finally determined by the said Supreme Court of the Territory of Hawaii on the 28th day of January, 1905, and that the same was not subject to review by this court.

19. That the court erred in overruling the objection of this defendant to the 12th finding of fact, on the ground that the same was not supported by the uncontradicted evidence in the action.

20. That the court erred in overruling the exception to the 13th finding of fact, on the ground that the uncontradicted evidence showed a rescission of the contract of March 13, 1901, so far as it sought to reserve the title in the property sued for as against this defendant and the Receiver of said Kona Sugar Company, the creditors of said Receiver and the holders of the mortgage bond of said Company.

21. That the court erred in overruling the exception of this defendant to the second conclusion of law made by the Circuit Court.

22. That the court erred in overruling the exception of this defendant to the fourth conclusion of law.

23. That the court erred in overruling the exception of this defendant to the sixth conclusion of law.

24. That the court erred in overruling the exception of this defendant to the seventh conclusion of law.

25. That the court erred in rendering its decision and judgment in favor of the plaintiff and against the defendant in error for that portion of the property sued for which was attached to the soil, on the ground that the same was a fixture and not the subject of an action of replevin, and on the further ground that the plaintiff *were* estopped to claim said property, the same having been affixed to the soil with its knowledge and consent.

Feb. 25th,

Dated, Honolulu, A [May 6],* A. D. 1908.

(Signed)

JOHN W. CATHCART,

(Signed)

CASTLE & WITHINGTON,

Attorneys for Clinton J. Hutchins, Trustee, Appellant.

Indorsement: Original. — No. Supreme Court of the United States. [Territory of Hawaii].* William W. Bierce, Limited, a corporation, Appellee, vs. Clinton J. Hutchins, Trustee, Appellant. Assignment of Errors. Filed May 7, 1908. J. A. Thompson, Clerk. Castle & Withington, John W. Cathcart, Attorneys for Appellant.

1396 On the 6th day of November, A. D. 1909, in the October Term of said Supreme Court of the year 1909, in the record of the proceedings in said entitled cause, appears the following entry, to wit:

1397 Vol. 3, p. 176.

SATURDAY, Nov. 6, 1909.

Court convened at 10 o'clock A. M.

Present on the Bench: Hon. A. A. Wilder, J.

S. C., No. 434.

From page 162.

WILLIAM W. BIERCE, LIMITED,

v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Error to Circuit Court, First Circuit.

The Court this day handed down its written opinion in the above entitled cause, the concluding paragraph of said opinion being in

[* Words and figures enclosed in brackets erased in copy.]

the following words, to wit: "The motion to dismiss the writ is denied and the judgment non obstante is affirmed."

J. A. THOMPSON,
Clerk Supreme Court.

1398 Thereafter, to wit, on the 23rd day of November, A. D. 1909, the said Supreme Court made and entered and filed in the clerk's office of said Supreme Court, an order denying the said motion to quash, which said order is in the words and figures following, to wit:

1399 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Error to Circuit Court, First Circuit.

Order.

The motion of the above named defendants in error to quash the plaintiff's writ of error issued in the above entitled cause on the 29th day of June, 1909, to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, having come on to be heard and the same having been considered, and this Court being fully advised in the premises:

Now, therefore, it is hereby ordered that the said motion to quash be, and the same is hereby, denied.

Dated Honolulu, T. H., November 23, 1909.

By the Court.

[SEAL.] (Signed) J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed: No. 434. (Original.) Supreme Court of the Territory of Hawaii. October Term, 1909. William W. Bierce, Limited, Plaintiff in Error, vs. William Waterhouse and Albert Waterhouse, Executors, etc., Defendants in Error. Error to Circuit Court, First Circuit. Order. Filed November 23, 1909, at 3:35 o'clock P. M. J. A. Thompson, Clerk.

1400 On the same day, to wit, the 23rd day of November, A. D. 1909, the said Supreme Court did make and enter and file in the clerk's office of said Supreme Court its final judgment in said cause in said Supreme Court, which said judgment is in the words and figures following, to wit:

1401 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,

vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Error to Circuit Court, First Circuit.

Judgment.

In the above entitled cause, the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid (which judgment was entered in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii on the 29th day of May, 1909, in that certain action of assumpsit in said Circuit Court, wherein William W. Bierce, Limited, a corporation, was plaintiff, and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, were defendants, whereby it was adjudged that, notwithstanding the verdict in said cause, the plaintiff take nothing by its writ and that the defendants recover of and from the plaintiff their costs taxed at the sum of one thousand ninety-seven and 22/100 dollars), is there anything erroneous, vicious or defective, and that in said record there is no error.

Now, therefore, it is hereby adjudged that the said judgment be, and the same is hereby, affirmed in all things and respects,
1402 and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

Dated, Honolulu, T. H., Nov. 23, 1909.

By the Court:

[SEAL.]

(Signed)

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed: No. 434. (Original.) Supreme Court of the Territory of Hawaii. October Term, 1909. William W. Bierce, Limited, Plaintiff in Error, vs. William Waterhouse and Albert Waterhouse, Executors, etc., Defendants in Error. Error to Circuit Court, First Circuit. Judgment. Filed November 23, 1909, at 3:35 o'clock P. M. J. A. Thompson, Clerk.

1403 Thereafter, to wit, on the 21st day of December, A. D. 1909, came William W. Bierce, Limited, the plaintiff-in-error in said Supreme Court, by its attorneys, and filed in the clerk's

office of said Supreme Court its certain petition for writ of error and the allowance thereof, which said petition for writ of error and allowance thereof are in the words and figures following, to wit:

1404 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Petition for Writ of Error from Supreme Court of the United States to Supreme Court of the Territory of Hawaii.

UNITED STATES OF AMERICA,
Territory of Hawaii:

To the Honorable the Chief Justice of the Supreme Court of the Territory of Hawaii:

The petition of William W. Bierce, Limited, a corporation, respectfully shows that in the record and proceedings in a certain cause lately pending in the Supreme Court of the Territory of Hawaii, wherein the above named William W. Bierce, Limited, was plaintiff in error and the above named William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, were defendants in error, and in the rendition of the final judgment against your petitioner in said cause on the 23rd day of November, A. D. 1909, manifest errors have happened to the great damage of your petitioner, which said errors are specifically set forth in the assignment of errors filed with this petition, to which reference is hereby made; that the amount involved in said

1405 suit, exclusive of costs, exceeds the sum or value of Five Thousand Dollars (\$5,000); that said cause was tried by a jury in the lower court of original jurisdiction and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore, your petitioner would respectfully pray that a writ of error be allowed to it in the above entitled cause, directing the Clerk of the Supreme Court of the Territory of Hawaii to send to the Supreme Court of the United States a transcript of the record, proceedings and papers in this cause, duly authenticated, for the correction of the errors so complained of, and for citation and supersedeas; and your petitioner will ever pray, etc.

(Sgd.)

(Sgd.)

(Sgd.)

(Sgd.)

HENRY W. PROUTY,

HENRY HOLMES,

WILLIAM L. STANLEY,

CLARENCE H. OLSON,

Attorneys for Plaintiff in Error.

The foregoing petition is granted, and the writ of error allowed as prayed for, upon the plaintiff's giving bond according to law in the sum of Three Thousand Dollars (\$3,000).

(Sgd.)

[SEAL.]

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court
of the Territory of Hawaii.

Endorsed: No. 434. (Original). In the Supreme Court of the Territory of Hawaii. October Term 1909. William W. Bierce, Limited, Plaintiff in Error, vs. William Waterhouse and Albert Waterhouse, Executors, etc. Defendants in Error. Petition for Writ of Error from Supreme Court of the United States to Supreme Court of the Territory of Hawaii. Henry W. Prouty, Henry Holmes, William L. Stanley and Clarence H. Olson, Attorneys for Plaintiff in Error. Filed December 21, 1909, at 10:30 o'clock A. M. 1406 J. A. Thompson, Clerk.

1407 On the same day, to wit, the 21st day of December, A. D. 1909, came William W. Bierce, Limited, said plaintiff-in-error, by its attorneys and filed in the clerk's office of said Supreme Court an assignment of errors, which said assignment of errors is in the words and figures following, to wit:

1408 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

WILLIAM W. BIERCE, LIMITED, Plaintiff in Error,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants in Error.

Error to Supreme Court, Territory of Hawaii.

Assignment of Errors.

Now comes the above named plaintiff in error, William W. Bierce, Limited, by Henry W. Prouty, Henry Holmes, William L. Stanley and Clarence H. Olson, its attorneys, and says that in the record and proceedings aforesaid of said Supreme Court of the Territory of Hawaii, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in the following among other things, to-wit:

1. Said Supreme Court erred in entering judgment affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii *non obstante veredicto* for the defendants in said cause and for their costs, taxed at the sum of One Thousand, Ninety-seven and 22/100 Dollars (\$1,097.22) entered on the 29th day of May, A. D. 1909, against said plaintiff in error.

1409 2. Said Supreme Court erred in entering judgment affirming the judgment of the Circuit Court for the First Judicial

Circuit aforesaid vacating and setting aside the judgment entered in said cause on the 29th day of May, A. D. 1908, on the verdict found by the jury therein, in favor of the plaintiff and against the defendants, for the plaintiff's damages as assessed by the jury and for its statutory attorneys' fees and costs of suit as taxed, and ordering and adjudging, notwithstanding the said verdict, that the plaintiff take nothing by its writ, and that the defendants recover of and from the plaintiff their costs, taxed at the sum of One Thousand, Ninety-seven and 22/100 Dollars (\$1,097.22).

3. Said Supreme Court erred in not reversing the said judgment for the defendants *non obstante veredicto* and for their costs, entered by the Circuit Court for the First Judicial Circuit aforesaid on the 29th day of May, A. D. 1909.

4. Said Supreme Court erred in not reversing said judgment of the Circuit Court vacating its judgment entered on the 29th day of May, 1908, on the verdict of the jury, for the plaintiff's damages, statutory attorneys' fees and costs of suit as taxed, and adjudging, notwithstanding the said verdict, that the plaintiff take nothing by its writ, and that the defendants recover from the plaintiff their costs, taxed at the sum of One Thousand, Ninety-seven and 22/100 Dollars (\$1,097.22).

5. Said Supreme Court erred in not reversing the judgment entered in said cause by the Circuit Court aforesaid on the 29th day of May, A. D. 1909, and in not remanding said cause to said Circuit Court with directions to vacate and set aside said judgment so as to leave in full force and effect the judgment entered by said Circuit Court in said cause on the 29th day of May, A. D. 1908, on the verdict found by the jury therein, in favor of the plaintiff and against the defendants, for the plaintiff's damages as assessed by the jury and for its statutory attorneys' fees and costs of suit as taxed.

6. Said Supreme Court erred in not reversing the judgment entered in said cause by the Circuit Court aforesaid on the 29th day of May, A. D. 1909, and in not remanding said cause to said Circuit Court with directions to vacate and set aside said judgment, and to enter judgment on the verdict found by the jury in said cause, in favor of the plaintiff and against the defendants, for the plaintiff's damages as assessed by the jury and for its statutory attorney's fees and costs of suit as taxed.

7. Said Supreme Court erred in not sustaining the assignment of errors upon the record in said cause, and each of the errors therein assigned.

8. Said Supreme Court erred in holding that the sureties on the bond sued on in said cause were discharged from liability thereon by the making of the amendments of the averments of the value of the property in question in the complaint in the action of replevin in question.

9. Said Supreme Court erred in holding that the plaintiff's amendments of the averments of the value of the property in question, as contained in the complaint as amended in the action of replevin in question, operated to discharge the defendants from liability for the demand sued for in said cause.

Wherefore, the said plaintiff in error prays that for the errors aforesaid and other errors appearing in the record of said Supreme Court in the above entitled cause to the prejudice of the plaintiff in error, the said judgment of said Supreme Court be reversed, annulled and for naught esteemed, and that said cause be remanded to the Circuit Court for the First Judicial Circuit of the Territory of Hawaii, with directions to vacate and set aside the judgment *non obstante veredicto* for defendants and for their costs entered therein on the 29th day of May, A. D. 1909, and adjudging that the judgment entered on the 29th day of May, A. D. 1908 on the verdict found by the jury in said cause, in favor of the plaintiff and against the defendants, for the plaintiff's damages as assessed by the jury and for its statutory attorneys' fees and costs of suit as taxed, be vacated and set aside, so as to leave the said last mentioned judgment in full force and effect, or else with directions to vacate and set aside the said judgment entered in said cause by the Circuit Court aforesaid, on the 29th day of May, A. D. 1909, as aforesaid, and to enter judgment on the verdict found by the jury in said cause, in favor of the plaintiff and against the defendants, for the plaintiff's damages as assessed by the jury in said verdict, and for its statutory attorneys' fees and costs of suit as taxed, or for such further proceedings in said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

(S'g'd)

(S'g'd)

(S'g'd)

(S'g'd)

HENRY W. PROUTY,

HENRY HOLMES,

WILLIAM L. STANLEY,

CLARENCE H. OLSON,

Attorneys for Plaintiff in Error.

1412 Endorsed: No. 434. (Original.) In the Supreme Court of the Territory of Hawaii. October Term, 1909. William W. Bierce, Limited, Plaintiff in Error, vs. William Waterhouse and Albert Waterhouse, Executors, etc., Defendants in Error. Error to Supreme Court, Territory of Hawaii. Assignment of Errors. Filed December 21, 1909, at 10:30 o'clock A. M. J. A. Thompson, Clerk. Henry W. Prouty, Henry Holmes, William L. Stanley, and Clarence H. Olson, Attorneys for Plaintiff in Error.

1413 On the same day, to wit, the 21st day of December, A. D. 1909 came William W. Bierce, Limited, said plaintiff-in-error as principal, and Fidelity and Deposit Co. of Maryland, as sureties, and filed in the clerk's office of said Supreme Court a bond on writ of error and an approval thereof, which said bond and approval thereof are in the words and figures following, to wit:

1414 Know all men by these presents, That we, William W. Bierce, Limited, a corporation, as principal, and Fidelity and Deposit Co. of Maryland, as sureties, are held and firmly bound unto William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, in the full

and just sum of Three Thousand Dollars (\$3,000.00) to be paid to the said William Waterhouse and Albert Waterhouse, Executors as aforesaid, their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of December in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a Supreme Court of the Territory of Hawaii, in a suit depending in said Court, between William W. Bierce, Limited, a corporation, plaintiff in error, and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, deceased, defendants in error, a judgment was rendered against the said William W. Bierce, Limited, plaintiff in error, and the said William W. Bierce, Limited, plaintiff in error having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington within 60 days from the date thereof,

Now, the condition of the above obligation is such, That if the said William W. Bierce, Limited, a corporation, shall prosecute said writ of error [shall prosecute]* to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM W. BIERCE, LIMITED,

(Sig.)

By COLUMBUS BIERCE, *Vice-President.*

Attest:

(Sig.) E. W. HOLDEN, *Secretary.*

[SEAL.]

FIDELITY & DEPOSIT CO. OF
MARYLAND,

(Sig.)

By ARTHUR BERG,

[SEAL.]

Its Attorney in Fact.

(Sig.)

By JAMES M. MACCONEL,

[SEAL.]

Its Agent.

Sealed and delivered in presence of—

— — —
— — —

Approved by—

[SEAL.] (Signed) ALFRED S. HARTWELL,

*Chief Justice of Supreme Court
of the Territory of Hawaii.*

Endorsed: [United States Circuit Court, Northern Dist. of Illinois,
Northern Division.]* Supreme Court Territory of Hawaii. Wil-

liam W. Bierce, Ltd., vs. William Waterhouse and Albert Waterhouse, Executors, etc. Bond. Filed December 21, 1909, at 10.30 o'clock A. M. J. A. Thompson, Clerk.

1416 On the same day, to wit, the 21st day of December, A. D. 1909 there was issued by the clerk of the Supreme Court of the Territory of Hawaii a writ of error for the transmission of the record and proceedings and judgment in said cause in said Supreme Court from said Supreme Court of the Territory of Hawaii to the Supreme Court of the United States at Washington, which said writ of error is in the words and figures following, to wit:

1417 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the [Circuit Court of the United States for the Northern District of Illinois,]* Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of Supreme the judgment of a plea which is in the said [Circuit]* Court before you, or some of you, between William W. Bierce, Limited, a corporation, plaintiff in error, and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, defendants in error, a manifest error hath happened, to the great damage of the said William W. Bierce, Limited, plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the 1418 same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-first day of December, in the year of our Lord one thousand nine hundred and nine.

[SEAL.] (Signed) HENRY SMITH,
Clerk of the [Circuit Court of the United States for the
Northern Dist. of Illinois,]* Supreme Court of the
Territory of Hawaii.

Allowed by

[SEAL.] (Signed) ALFRED S. HARTWELL,
Chief Justice of the Supreme Court
of the Territory of Hawaii.

Endorsed: No. 434. Supreme Court of the United States. William W. Bierce, Ltd. vs. William Waterhouse, et al. Writ of Error. Filed December 21, 1909, at 10:30 o'clock A. M. J. A. Thompson, Clerk. Copy deposited for the defendant in error in the Clerk's Office, [U. S. Circuit Court, Northern District of Illinois]* Supreme Court of Territory of Hawaii. In obedience to the within writ, the record and proceedings in the within entitled cause, with all the things concerning the same are herewith sent to the Supreme Court of the United States. Witness my hand and the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, Territory of Hawaii, this 31st day of January, A. D. 1910. J. A. Thompson, Clerk Supreme Court of the Territory of Hawaii. (Seal.)

1419 On the same day, to wit, the 21st day of December, A. D. 1909, there was issued by the Chief Justice of the Supreme Court of the Territory of Hawaii a citation, which said citation and an admission of service thereof, returned and filed on said 21st day of December, A. D. 1909, in the clerk's office of said Supreme Court, are in the words and figures following, to wit:

1420 UNITED STATES OF AMERICA, *ss.*:

To William Waterhouse and Alber Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a Su-
60

preme Court of the United States, at Washington, within [30]* days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the [United States]* Territory of Hawaii, wherein William W. Bierce, Limited, a corporation, is plaintiff in error, and you are defendants in error. [and you are —]* to show cause, if any there be, why the judgment rendered against the said plaintiff as in the said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Alfred S. Hartwell, Chief Justice of the Supreme Court of the Territory of Hawaii this twenty first day of December, in the year of our Lord one thousand nine hundred and nine.

(Signed)

ALFRED S. HARTWELL.

[SEAL.] [Judge]* Chief Justice of the Supreme Court
of the Territory of Hawaii.

Endorsed: No. 434. No. —. Supreme Court of the United States. William W. Bierce, Ltd. vs. William Waterhouse, et al. Citation. To the Supreme Court of the United States. Filed and Issued for Service December 21, 1909, at 10:50 A. M. J. A. Thompson, Clerk. On this — day of —, in the year of our Lord one thousand nine hundred —, personally appeared

— before me, the subscriber, and makes oath that he delivered a true copy of the within citation to —.

Sworn to and subscribed the — day of —, A. D. 19—.

Service of a copy of the within citation upon me is hereby admitted this 21st day of December, 1909. A. Lewis, Jr., Attorney for Defendants in Error. Returned December 21, 1909, at 1:45 P. M. J. A. Thompson, Clerk.

1422

Rules of the Supreme Court.

In Force March 21, 1906.

1. Entry of Cases on Calendar.

1. The clerk shall place upon the calendar each case brought to or pending in this court in its proper chronological order and forthwith give notice thereof to the parties.

2. If the necessary papers are not filed in this court within twenty days after the issuance of a writ of error, perfecting of an appeal or allowance of a bill of exceptions or such further time as may be allowed by this court or a justice thereof the appeal may be dismissed for want of prosecution. Failure of the stenographer to furnish a transcript of the evidence shall not excuse delay unless within ten days after the filing of the decree, judgment or verdict sought to be set aside the appellant shall have obtained from the lower court or judge a direction to the stenographer to prepare and furnish the desired transcript in the regular order of cases tried or in such other order as the court or judge shall direct, which direction may be conditioned on the appellant's making a deposit or giving security for the estimated cost of the transcript.

2. Call and Order of Calendar.

1. Cases will be called for argument or trial in the order in which they stand on the calendar except as hereinafter provided or otherwise ordered. Sessions will be held beginning on the first Monday of each month during the term unless otherwise ordered.

2. If the parties, or either of them shall be ready to proceed when the case is called, the same will be heard, unless otherwise ordered for good cause shown. If neither party shall be ready, the case may be postponed or go to the foot of the calendar, as the court may order.

3. If a case is called at two sessions, and upon the call at 1423 the second session neither party is ready to proceed, it may be dismissed unless sufficient cause is shown for further postponement.

4. Criminal cases, cases in which the Territory is concerned and which also involve or affect some matter of general public interest, cases once adjudicated by this court on their merits and again brought up, writs of habeas corpus and extraordinary writs, may be advanced by leave or order of the court.

5. Two or more cases involving the same question may by leave or order of the court, be heard together, to be argued as one case or more, as the court may order.

6. Any case may, by filed stipulation, be submitted on briefs without oral argument at any time during the term, irrespective of its position on the calendar.

7. Except as aforesaid, no case will be taken up out of its order on the calendar or be set down for any particular day except upon special and peculiar circumstances to be shown to the court.

8. No stipulation or agreement of the parties to advance, pass or postpone a case, or to substitute one case for another, shall be binding upon the court. A case may be so advanced, passed, postponed or substituted only upon application made and leave granted in open court.

3. Briefs.

1. Within fifteen days after an appeal case has been placed on the calendar the appellant shall file a printed or typewritten brief and two copies thereof and a certificate of service of a copy thereof upon the appellee.

2. Within ten days after receipt of a copy of the appellant's brief the appellee shall file a printed or typewritten brief and two copies thereof and a certificate of service of a copy thereof on the appellant.

3. Within five days after receipt of a copy of the appellee's brief the appellant may file a brief confined strictly to matter in reply to the appellee's brief.

1424 4. It will be a sufficient compliance with the foregoing provisions of this rule if the briefs are deposited in the mail, duly postpaid and addressed to the office address of the clerk or opposing counsel, as the case may be, in time to reach such address in due course of mail within the times limited in said provisions.

5. When, according to the foregoing provisions of this rule, an appellant is in default, the case may be dismissed; and when an appellee is in default, he will not be heard, except on consent of his adversary or on call of the court.

6. In cases brought originally in this court, briefs shall be filed on both sides at or before the argument, unless otherwise ordered by the court.

7. When evidence is referred to in a brief the page or pages on which it appears in the transcript shall be stated.

4. Oral Arguments.

1. The appellant or, in original cases, the petitioner, shall be entitled to open and conclude the argument of the case; but when the questions on appeal arise solely upon demurrer or otherwise solely upon the pleadings, the order of argument shall be the same as in the court below. When there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Not more than two hours on each side will be allowed for argu-

ment without special leave of the court granted before the argument begins.

5. Rehearing.

A petition for rehearing may be presented only within twenty days after the filing of the opinion or the rendition of judgment unless by special leave granted during such twenty days; and shall briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be permitted to be argued unless
1425 a justice who concurred in the opinion or judgment desires it. If the case has been remitted to the lower court it may be recalled.

6. Motions.

1. All motions shall be reduced to writing. No facts will be considered unless shown by the record or by affidavit.

2. A copy of the motion shall be served on the opposite party not less than forty eight hours before the hearing, unless otherwise ordered by the court.

3. The motion day shall be the first day of each stated session.

4. Any motion of which notice shall have been given to the clerk in advance, shall be entered on the clerk's list in the order in which he receives such notice, and shall have priority in that order before other motions.

5. Not more than half an hour on each side shall be allowed for argument of a motion, without special leave of the court before the argument begins.

6. There may be united with a motion to dismiss, a motion to affirm on the ground that, although the record may show that the case is properly before this court, it is manifest that the appeal was taken for delay or that the question involved is such as not to need further argument.

7. Transcripts of Evidence.

(Repealed.)

8. Appeal, Error and Exceptions from Circuit Courts and Circuit Judges.

1. On appeal, error or exceptions from a circuit court or circuit judge, no original papers other than bills of exceptions, transcripts of evidence and exhibits, shall be transmitted to this court unless
1426 by order of the court or a justice thereof. Original transcripts and exhibits may be returned to the circuit court or judge upon the determination of the case in this court unless otherwise ordered. Copies of papers shall be printed or typewritten and certified.

2. Bills of exceptions shall contain only such papers and statements as are necessary for the disposition of the questions of law raised by the exceptions. No papers shall be made a part thereof by reference unless specifically named.

9. Writs of Error.

Cases brought up by writ of error, as well as those brought up by appeal or bill of exceptions, shall retain the title of the case below without reversing the order of the names.

10. Costs.

1. Attorneys shall be liable for costs of court incurred by their respective clients.

2. Bonds for costs on appeal to the Supreme Court shall be made to the Clerk of the Judiciary Department, filed in the court from which the appeal is taken and forwarded by such court to the Supreme Court.

11. Mandate.

Whenever appropriate upon the determination of a matter in this court a notice or mandate shall be issued to the court below informing that court of the proceedings in this court or directing further proceedings in that court as to law and justice may appertain. The notice or mandate may issue at any time on the order of the court or a justice thereof, but, unless otherwise ordered by the court or a justice thereof, it shall issue as of course after ten days from the rendition of judgment.

12. Papers.

No paper shall be taken from the files of the court except by permission of the court or a justice thereof.

1427

13. Library.

No book, pamphlet or magazine shall be taken from the library of this court, except for use in this court or in the Circuit Court of the First Circuit, without the permission of a justice of this court or a judge of said Circuit Court; provided, however, that any member of the bar may take one or more text books, not exceeding three at any one time, upon giving a receipt therefor to the librarian or making an entry thereof in a book kept by the librarian for that purpose; and provided further that books may be taken for use in the United States District Court or by the United States District Judge upon the taker giving a receipt or making an entry. The taker of any book, pamphlet or magazine shall be responsible for the due return of the same within three days, or sooner if so required by the librarian, and, in case the same shall not be so returned, shall forfeit and pay fifty cents for each day's detention thereof beyond the time limited until the return thereof or the payment of twice the value thereof or cost of replacing the same. Any one taking a book, pamphlet or magazine without such permission or without giving such receipt or making such entry, as the case may be, shall be liable to suspension from the use of the library.

14. Appeals from District Courts.

District Magistrates in all cases in which appeals have been taken and perfected from them to the Supreme Court, shall forward without delay to the Clerk of the Supreme Court a certificate of appeal, stating the nature of the action, the decision made and the points of law upon which the appeal is taken; also, the summons or warrant, all vouchers and exhibits filed, or certified copies thereof, and a transcript of the testimony; also, all costs paid by either party to the action, with a clear and itemized statement showing by whom, and the purpose for which, each amount is paid, keeping back nothing but statutory fees and mileage, and stating explicitly what is kept back.

15. Defense of Title in District Courts.

Whenever, in the District Court, in defense of an action of trespass, or a suit for the summary possession of land, or any other action, the defendant shall plead to the jurisdiction in effect that the suit is a real action, or one in which the title to real estate is involved, such plea shall not be received by the court, unless accompanied by an affidavit of the defendant, setting forth the source, nature and extent of the title claimed by defendant to the land in question, and such further particulars as shall fully apprise the court of the nature of defendant's claim.

16. Admission to the Bar.

1. Each applicant for admission to the bar shall file with the clerk an application setting forth his name, age, nationality, last place of residence and the character and term of his study. Sufficient certificates of the applicant's good moral character, and, if he is a member of the bar of any other court, the certificate of admission to such bar, shall accompany the application.

2. No applicant who is not a member of the bar of the highest court of some other state, territory or country, will be admitted or examined for admission to practice in this court unless, as a part of his preparation, he shall have studied diligently at least two years in a law school or the office of a competent attorney, or partly in such school and partly in such office.

3. No person who is not a citizen of the United States will be admitted unless he shall have bona fide declared his intention to become a citizen in the manner required by law.

4. No applicant whose application has been denied shall apply again for admission within one year thereafter.

1429

17. Definitions.

Within the meaning of the rules of this court, whenever appropriate, appeal cases include cases brought up on bill of exceptions or writ of error, "appellant" and "appellee" include the plaintiff and defendant in error respectively; and "party," "appellant" and "ap-

pellee" and other words denoting the parties include their counsel.

(*Amendment to Rule 13, November 6, 1907.*)

No book, pamphlet or magazine shall be taken from the library of this court, except for use in a court-room within the Judiciary Building, without the written permission of a justice of this court. Any person violating this rule shall be liable to suspension from the use of the library and shall make good all loss.

(*Addition to Rule 16, October 5, 1908.*)

Unless otherwise directed by the court regular examinations of candidates for admission to the bar will be held at Honolulu during the months of October and April.

1430 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff-in-Error,
vs.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants-in-Error.

Error to Circuit Court, First Circuit.

Clerk's Certificate to Transcript of Record.

TERRITORY OF HAWAII,

City and County of Honolulu, ss:

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify *that* the above and foregoing to be a true, correct and complete transcript of the record of all the proceedings had in said Court in the case wherein William W. Bierce, Limited, a Corporation, is the plaintiff-in-error and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, are the defendants-in-error, as the same appear from the records and files of said Court now remaining in my custody and control, including the petition for writ of error, bond on writ of error and assignment of errors, together with a true, correct and complete transcript of the record of all the rules of said Court in force at all times on and subsequent to the 29th day of June, A. D. 1909, and now in force, as the same appear from the records and files of said Court now remaining in my custody and control, except only the rules of said Court relating to grand juries, and that the original writ of error from the Supreme Court of the United States and return thereof and the original citation and ad-

mission of service thereof, and a certified copy of the opinion of the Supreme Court of the Territory of Hawaii rendered in said cause on the 6th day of November, A. D. 1909, are hereto attached and herewith returned.

I do further certify that the said original writ of error and copy of the same for the defendants in error and also the original of said bond were lodged in my office on the 21st day of December, A. D. 1909.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, in said Territory of Hawaii on this 31st day of January, A. D. 1910.

[Seal Supreme Court, Territory of Hawaii.]

JAMES A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

Expenses for typewriting and preparing foregoing transcript of record, Three Hundred and Ninety Dollars. Paid by William W. Bierce Ltd. January 31, 1910.

J. A. THOMPSON.

1431 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, between William W. Bierce, Limited, a corporation, plaintiff in error, and William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, defendants in error, a manifest error hath happened, to the great damage of the said William W. Bierce, Limited, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the twenty-first day of December, in the year of our Lord one thousand nine hundred and nine.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,

Clerk of the Supreme Court of the Territory of Hawaii.

Allowed by

ALFRED S. HARTWELL,

*Chief Justice of the Supreme Court of the
Territory of Hawaii.*

[Seal Supreme Court, Territory of Hawaii.]

[Endorsed:] No. 434. Supreme Court of the United States. William W. Bierce, Ltd., vs. William Waterhouse, et al. Writ of Error. Filed December 21, 1909, at 10.30 o'clock A. M. J. A. Thompson, Clerk. Copy deposited for the defendant in error in the Clerk's Office, Supreme Court of Territory of Hawaii.

In obedience to the within Writ, the record and proceedings in the within entitled cause, with all things concerning the same, are herewith sent to the Supreme Court of the United States.

Witness my hand and the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, Territory of Hawaii, this 31st day of January, A. D. 1910.

[Seal Supreme Court, Territory of Hawaii.]

J. A. THOMPSON,

Clerk Supreme Court of the Territory of Hawaii.

1432 UNITED STATES OF AMERICA, ss:

To William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, wherein William W. Bierce, Limited, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff as in the said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Alfred S. Hartwell, Chief Justice of the Supreme Court of the Territory of Hawaii this twenty-first day of December, in the year of our Lord one thousand nine hundred and nine.

[Seal Supreme Court, Territory of Hawaii.]

ALFRED S. HARTWELL,

*Chief Justice of the Supreme Court of
the Territory of Hawaii.*

[Endorsed:] No. 434. *No. —*. Supreme Court of the United States. William W. Bierce, Ltd., vs. William Waterhouse, et al. Citation to the Supreme Court of the United States. Filed and issued for service December 21, 1909 at 10:50 a. m. J. A. Thompson, Clerk. Returned December 21, 1909 at 1:45 P. M. J. A. Thompson, Clerk.

Service of a copy of the within citation upon me is hereby admitted this 21st day of December, 1909.

A. LEWIS, JR.,
Attorney for Defendants in Error.

1433 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

WILLIAM W. BIERCE, LIMITED,
v.

WILLIAM WATERHOUSE and ALBERT WATERHOUSE, Executors under the Will and of the Estate of Henry Waterhouse, Deceased.

Error to Circuit Court, First Circuit.

Argued September 30, 1909; Decided November 6, 1909.

Hartwell, C. J.; Wilder and Perry, JJ.

Appeal and error—dismissal of writ.

On exceptions by defendants, judgment for defendants non obstante veredicto was ordered. After entry in the lower court of the judgment non obstante plaintiff obtained a writ of error to review it. Held, that under these circumstances the writ should not be dismissed.

Id.—questions previously decided on exceptions.

A change in the personnel of the court does not of itself justify re-examination on a subsequent writ of error of questions already decided on exceptions in the same case,—assuming that the court has the power to do so.

1434 *Opinion of the Court by Perry, J.*

This case was before us in April, 1909, on a bill of exceptions brought by the defendants. 19 Haw. 398. A full statement of the case will be found in our former opinion. The conclusion of that opinion and the order there contained was, "the exception to the overruling of defendants' motion for judgment non obstante veredicto in so far as it is based upon their discharge from liability by the plaintiff's amendments of value is sustained. The remaining grounds of the motion and the remaining exceptions not necessarily involved are not passed upon." A petition for rehearing was filed and denied. Pursuing the ordinary practice, a communication

was thereupon sent by the clerk to the court appealed from, notifying that tribunal of the conclusion thus reached by this court but containing no express order as to future proceedings. Subsequently the circuit court entered judgment for the defendants non obstante veredicto and for \$1097.22 statutory attorneys' fees and costs. Plaintiff thereupon took out a writ of error from this court assigning as error the entry of the judgment non obstante. Defendants move to dismiss this writ on the grounds (a) that the record upon the writ does not present the record upon which the former decision of this court was based but only parts of the same, and (b) that the writ brings up no proceedings subsequent to the former decision of this court other than those had in exact accordance with such decision.

After the filing of the motion to dismiss plaintiff moved for a writ of certiorari commanding the lower court to certify to this court as a part of the record upon the writ of error the former bill of exceptions and certain other documents the omission of which is referred to as one of the grounds of the motion to dismiss. Some of these documents had been returned to the circuit court from 1435 this court after the former decision and others are still in this court. The statute, R. L. Sec. 1873, itself makes the bill of exceptions and the other documents a part of the record on this writ of error and it is in the interest of a correct determination of the cause in the supreme court of the United States, even if not necessary on this writ in this court, that the record should be complete. It was therefore ordered upon the presentation of the motion for the writ of certiorari that all documents in the case still in this court be transferred to and made a part of the record upon this writ and that the circuit court be directed to certify the remaining documents.

As to the motion to dismiss. The judgment non obstante was not specifically ordered by this court although it was a necessary result of our former opinion. It was the judgment of the circuit court in form and in fact although it was in precise accordance with our views and conclusion, but whether it was entered in accordance with our former opinion is something which cannot be determined without entertaining the present writ and thereunder examining the record brought up by it of the proceedings had in the lower court. It is a contradiction in terms to say that we find that the proceedings had were in compliance with our former conclusion and at the same time to say that the party is not entitled to the writ and that the latter must be dismissed. A dismissal is something which happens in limine and without a consideration of the merits. Even those courts which hold that a dismissal is the proper course rather than an affirmance of the judgment below entertain jurisdiction under the writ and reverse the action taken below if they find that it was not in accordance with the former mandate. See, for example, *Stewart v. Salamon*, 97 U. S. 361, 362; *Railroad v. Anderson*, 149 U. S. 237, 242; *Cook v. Burnley*, 11 Wall. 672, 674; *Browder v. M'Arthur*, 7 Wheat. 58; *Roberts v. Cooper*, 20 How. 467, 481; *Supervisors v. Kennicott*, 94 U. S. 498, 499; *The "Lady Pike"*, 96 U. S. 461, 462. The correct procedure, on reason, would seem to be to 1436 entertain jurisdiction and either affirm or reverse the judg-

ment appealed from. What questions are open to re-examination on such a writ is another matter. The mere fact, if such be the course adopted, that upon such a writ no re-examination is had upon issues arising prior to the entry of judgment and disposed of on a first appeal will effectively discourage an abuse of process in the taking of second or third appeals.

That this is the better rule appears even more clearly when we consider the class of cases where the circumstances are as they are in the case at bar. By the act of March 3, 1905 (33 Stat. at Large, p. 1035), it was enacted that "writs of error and appeals may also be taken from the supreme court of the Territory of Hawaii to the Supreme Court of the United States *in all cases* where the amount involved, exclusive of costs, exceeds the sum or value of \$5000." Congress clearly contemplated that appeals should lie *in all cases*, within the prescribed monetary limit, in which by a decision final in Hawaii the supreme court of Hawaii should determine the law, or in which, being within its jurisdiction, it should be asked to so determine the law. A decision by this court, such as was rendered in the case at bar, upon questions arising under a bill of exceptions is not final and appealable within the meaning of the act of 1905. This has been definitely determined by the Supreme Court of the United States. *Cotton v. Hawaii*, 211 U. S. 162, 170, 174, 175; *Hutchins v. Bierce*, 211 U. S. 429; *Spreckels v. Brown*, 212 U. S. 208. It cannot be said in this case that the plaintiff has waived its right to place itself in a position to enable it to appeal to the Supreme Court of the United States, for the former bill of exceptions was not brought by it but by its opponent. The plaintiff at that time was not aggrieved. The judgment of the lower court stood in its favor. It was aggrieved by our decision on the exceptions but had no right of appeal therefrom. Now for the first time the judgment of 1437 the circuit court stands against it. To hold that a writ of error lies to review the judgment non obstante, however narrow the reviewable issues may be in *this* court, is to further the intent of Congress as expressed in the act of 1905, while to hold the opposite is to nullify the provisions of that act and to deprive parties of the right to a review in the Supreme Court of the United States in a large class of cases, without any waiver and purely in consequence of the act of an opponent in choosing his method of review in the supreme court of Hawaii. At best it is a choice in a matter of mere procedure. That method is to be preferred which carries into effect the act of Congress. While it is true that this court should neither accelerate nor retard appeals from its decisions, it should nevertheless so act as not to deprive parties by its own act or permit them to be deprived by the act of an opponent of a right of appeal secured to them by congressional legislation.

It is true that in a number of cases the Supreme Court of the United States has adopted the procedure of dismissing second appeals and writs when they are simply taken from judgments and decrees entered in conformity with an earlier mandate of the appellate court, and other courts likewise have so held. In none of those cases, however, was the first adjudication by a court of intermediate

appeal and non-appealable to a court of last resort and therein lies an important distinction and one which requires the adoption of a rule contrary to that followed by the Supreme Court of the United States. But even in the latter tribunal instances are not wanting where the judgment appealed from has been affirmed and the appeal or writ not dismissed. See, for example, *Supervisors v. Kennicott*, supra; *The "Lady Pike,"* supra; *Washington v. Stewart*, 3 How. 413, 425, 426. See also *Lathrop v. Knapp*, 37 Wis. 307; *Fire Department v. Tuttle*, 50 Wis. 552.

Again, our statute on writs of error, R. L. Sec. 1869, 1438 contemplates that writs shall be allowed to any and all judgments of the circuit court, and while in this instance that court may have felt under compulsion to enter a judgment notwithstanding the latter was, nevertheless, its judgment. The plaintiff is entitled, as of right, to the issuance of the writ.

In *Kealoa v. Castle*, 17 Haw. 415, on a writ of error raising no questions other than those already decided upon reserved questions this court affirmed the decree appealed from, and the supreme court of the United States, affirming on the merits our decree, said nothing by way of disapproval of the practice. In *Notley v. Brown*, 17 Haw. 455, relied upon by the defendants, the case first came to this court on a bill of exceptions. The exceptions were overruled. Subsequently the same appellant brought a writ of error, in the same case, assigning as error the same matters decided on the exceptions and also certain proceedings had in the trial court after the remaining order and in conformity with it. The writ was dismissed. The majority is of the opinion that that case is distinguishable from this in that there the same party attempted to review the same questions a second time in the same case, in substantial conflict with the rule of election laid down in *Ferrira v. Rapid Transit Co.*, 16 Haw. 406, while here plaintiff for the first time is attempting to have reviewed a certain question which the statute gives him a right to do and which cannot be denied by this court.

As to how far, if at all, an appellate court is at liberty on a second appeal from a judgment entered in pursuance of its mandate on a first appeal to re-examine on the merits the questions already considered and decided courts are divided. The great majority, including the Supreme Court of the United States, take the view that a second appeal or writ brings up for review only the proceedings had in the lower court subsequent to the earlier mandate of the appellate court, and that on such appeal no re-examination may be had of matters occurring prior to the entry of such decree. The law as declared upon the first appeal is said to be "the law of the case" binding upon the appellate court which declared it as well as upon the inferior court. This view is based, sometimes upon the consideration *ut sit finis litium*, the argument being that if parties are to be permitted to take out appeals to secure a review of law once decided there never can be a certain end to the litigation, and sometimes on the theory that it is not within the power of the appellate tribunal to review its own decisions even though it be within its power

to review the decisions of lower tribunals,—that the law creating the appellate court gives it the power last mentioned but not the first. Sometimes, again, it is based on the doctrine of *res judicata*. These reasons appear to other courts not to be entirely satisfactory. It is well, indeed, say the latter, that there should be an end to litigation, but far better that occasionally that end be somewhat delayed than that a manifest error should be perpetuated. Concerning the alleged lack of power, it is similarly said that the real question which arises on the second writ is, "Is the judgment appealed from correct in law?" and the correct view that, if it is not, the appellate court, still considering the same case, still having before it the same parties and no final adjudication or execution having yet been rendered or issued, has the power to correct its error. Continuing, the weakness of the attempt to regard the former ruling as *res judicata* is said to lie in the fact that it is not a final judgment and that it is elementary that that doctrine is always predicated upon final judgments between the parties. On the other hand it can be said, in favor of the majority rule, that nothing substantial can be gained in the securing of right and justice by permitting a second or a third reopening of an argument instead of regarding the matter as closed after the first opinion with the usual right to a rehearing under the rules of court,—that it is as human to err on a second appeal as it is to err on a first appeal.

A minority of the state courts take the view that, while ordinarily an opinion once declared concerning the law should be thereafter adhered to by the appellate as well as other tribunals, still the rule is not an inflexible one and may be departed from where the prior opinion is manifestly erroneous. *Hastings v. Foxworthy*, 34 L. R. A. 321 (Neb.) contains the best considered opinion to this effect. The other states adopting this view are Missouri, Utah and Texas and, in some of their decisions, Connecticut, New York and Ohio. Which is the better doctrine need not, in the opinion of the majority, be determined in this case, the minority being of the opinion that the power of re-examination exists and that the point is necessarily involved. If the question decided on the bill of exceptions is not now open for re-examination, the judgment below must be affirmed. If, on the other hand, it is within our power to re-examine, the same result is reached. The matter was on the first appeal very carefully considered, after able and exhaustive presentation by counsel. No new argument on the merits is now advanced. It is not contended that any controlling decisions or principles were overlooked. The court is simply asked to study the issue anew, on practically the same briefs (no oral argument is presented) and to endeavor to come to the opposite conclusion. The only substantial hope of a reversal lies in the fact that since the former opinion was rendered, the personnel of the court has changed. This of itself is not sufficient to justify a re-examination. That degree of certainty which is desirable in the law forbids that a matter once adjudicated be re-opened for such a reason of this.

788 WILLIAM W. BIERCE, LTD., VS. WILLIAM WATERHOUSE ET AL.

1441 The motion to dismiss the writ is denied and the judgment non obstante is affirmed.

C. H. Olson (Holmes, Stanley & Olsen on the brief) for plaintiff.
A. Lewis, Jr. (Smith & Lewis, J. W. Cathcart, and Castle & Withington on the brief) for defendants.

(Signed)

ALFRED S. HARTWELL.

(Signed)

A. A. WILDER.

(Signed)

ANTONIO PERRY.

Endorsed: No. 434. Supreme Court, Territory of Hawaii. October Term, 1909. William W. Bierce, Limited, v. William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased. Opinion. Filed November 6, 1909, at 10:3 a. m. J. A. Thompson, Clerk.

1442

Clerk's Certificate.

TERRITORY OF HAWAII,

City and County of Honolulu, ss:

I, J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing document and attached hereto together with the endorsement thereon consisting of nine (9) pages, is a full, true and correct copy of the original opinion rendered and filed by the Supreme Court of the Territory of Hawaii on the 6th day of November, A. D. 1909, in a cause entitled "William W. Bierce, Limited, Plaintiff-in-error, versus William Waterhouse and Albert Waterhouse, Executors under the Will and of the Estate of Henry Waterhouse, Deceased, Defendants-in-Error." (Supreme Court Number 434.)

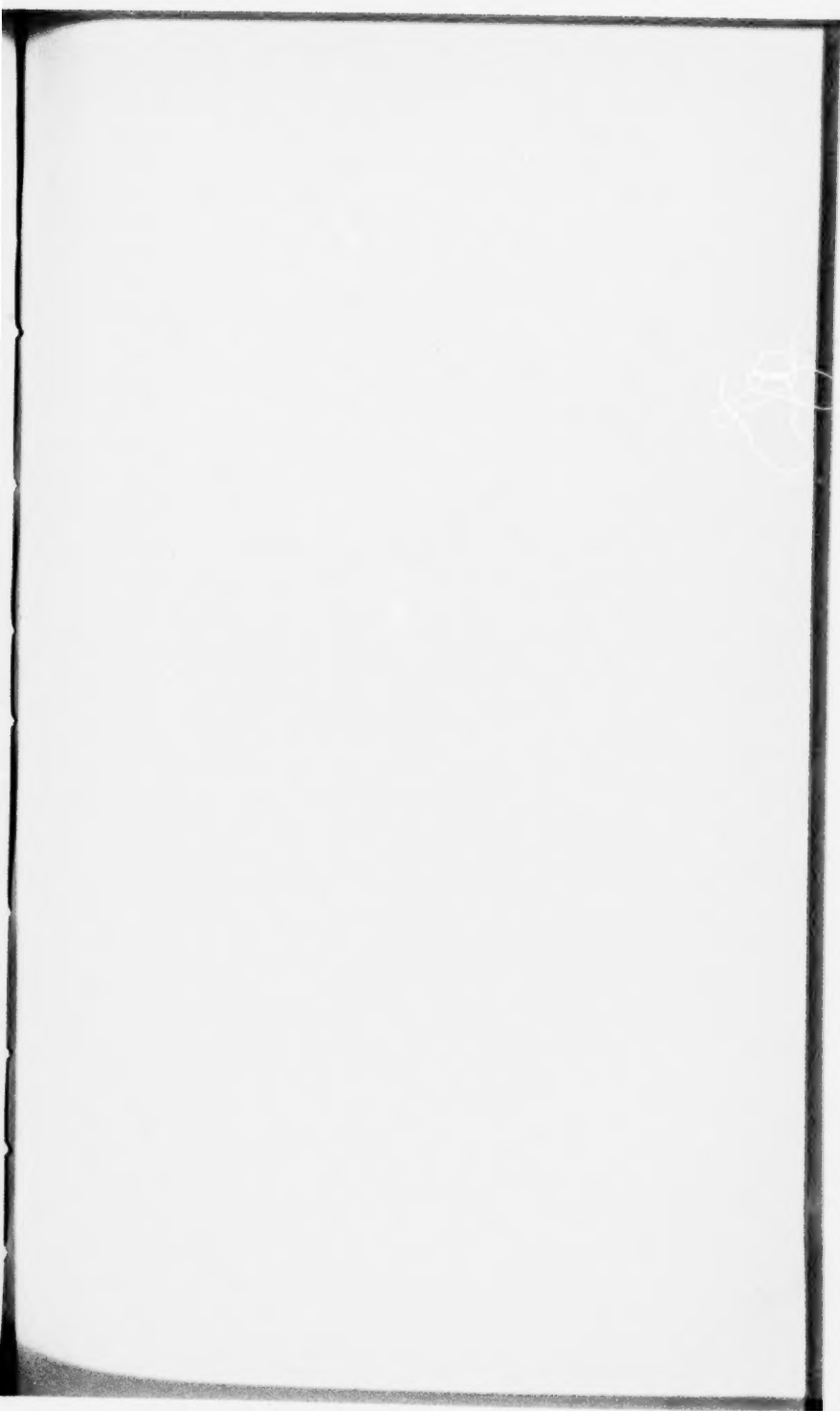
Witness my hand and the Seal of said Supreme Court of the Territory of Hawaii, at Honolulu, Oahu, this 26th day of January, A. D. 1910.

[Seal Supreme Court, Territory of Hawaii.]

J. A. THOMPSON,

Clerk Supreme Court, Territory of Hawaii.

Endorsed on cover: File No. 22,109. Territory of Hawaii Supreme Court. Term No. 508. William W. Bierce, Limited, plaintiff in error, vs. William Waterhouse and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased. Filed April 16, 1910. File No. 22,109.



IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 883.

WILLIAM W. BIERCE, LIMITED, PLAINTIFF IN ERROR,

vs.

WILLIAM WATERHOUSE AND ALBERT WATERHOUSE, EXECUTORS UNDER THE WILL AND OF THE ESTATE OF HENRY WATERHOUSE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

MOTION TO ADVANCE.

Now come the defendants in error, by their counsel, and respectfully move this honorable court that the above-entitled cause be advanced, under clause 2 of rule 26, as one heretofore adjudicated by this court upon the merits.

Very respectfully,

D. L. WITHINGTON,

A. B. BROWNE.

ALEX. BRITTON,

EVANS BROWNE.

Counsel for Defendants in Error.



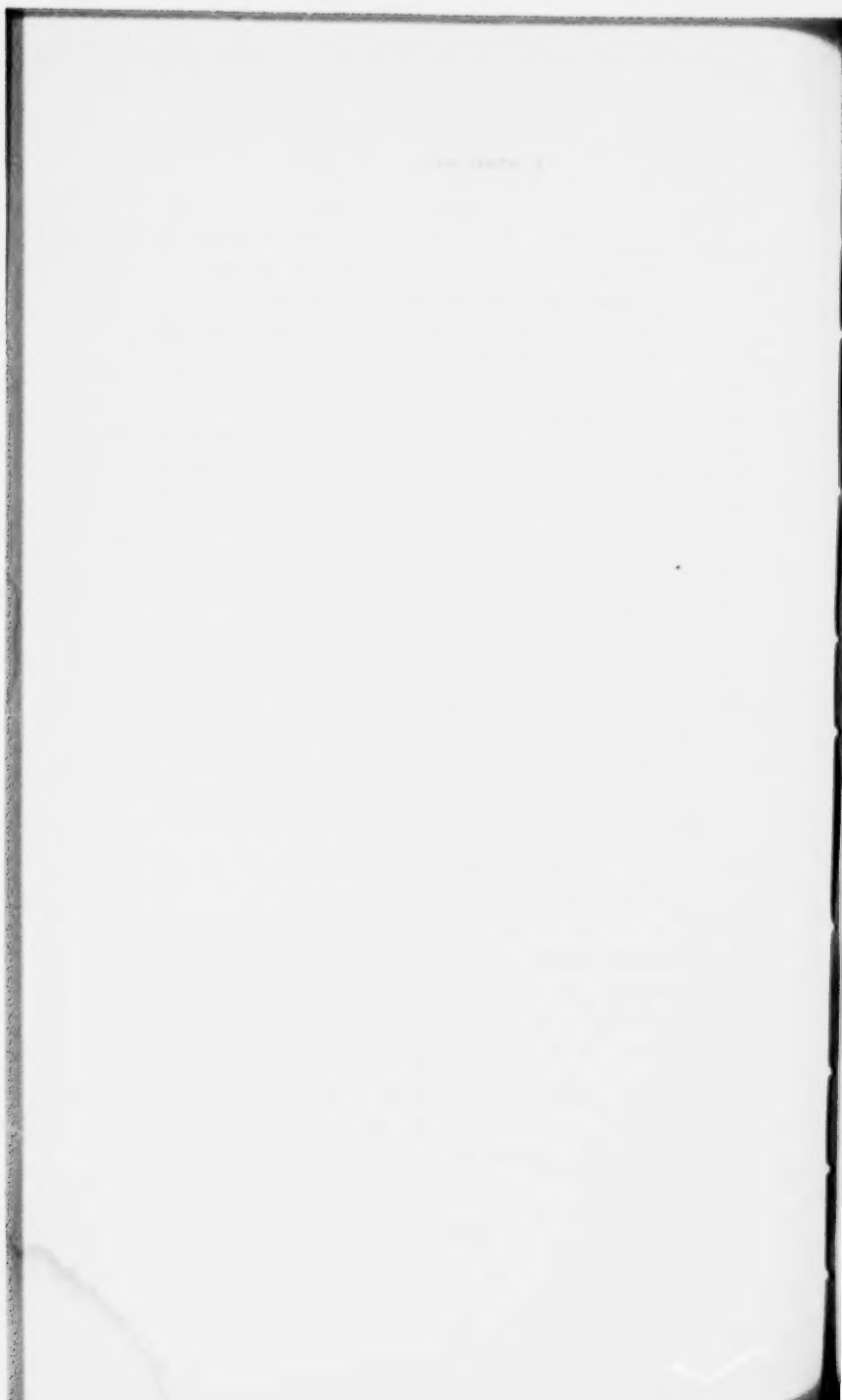
Statement.

In *William W. Bierce, Limited, vs. Hutchins* (205 U. S., 340), it was ruled that the action of replevin therein involved was properly brought by the appellant, and the decision of the Supreme Court below to the contrary accordingly reversed. Upon a second appeal the case, being entitled *Hutchins, Trustee, vs. William W. Bierce, Limited* (211 U. S., 429), was advanced and heard, but dismissed because the judgment of the Supreme Court of Hawaii, wherefrom the appeal was sought to be taken, was held not to be final.

During the progress of the replevin suit, and as a part of the same litigation, suit was brought to recover upon the forthcoming bond given by Hutchins at the time the action in replevin was brought. That is the present case now here on writ of error by William W. Bierce, Limited, from the judgment of the Supreme Court of Hawaii, holding the sureties relieved from the obligation of such bond. The present case is, therefore, a substantial part of the controversy and the litigation. The record therein, now docketed here, presents the record in the former cases, and which is, of course, relevant thereto. All parties are anxious to bring the litigation to a close, and we are authorized to say, on behalf of counsel for the plaintiff in error, that they concur in this application to advance the cause.

If the cause may be advanced for hearing at the coming term, we beg to suggest that the necessities of distant counsel prompt the request that same may be assigned for argument on the last Monday of November (November 28th), or as near thereto in December as the convenience of the court will permit.

D. L. WITHINGTON,
A. B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
Attorneys for Defendants in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 508.

U. S. Supreme Court, U. S.
No. 508.

DEC 9 1910

JAMES H. MCKENNEY

WILLIAM W. BIERCE, LIMITED, PLAINTIFF IN ERROR,

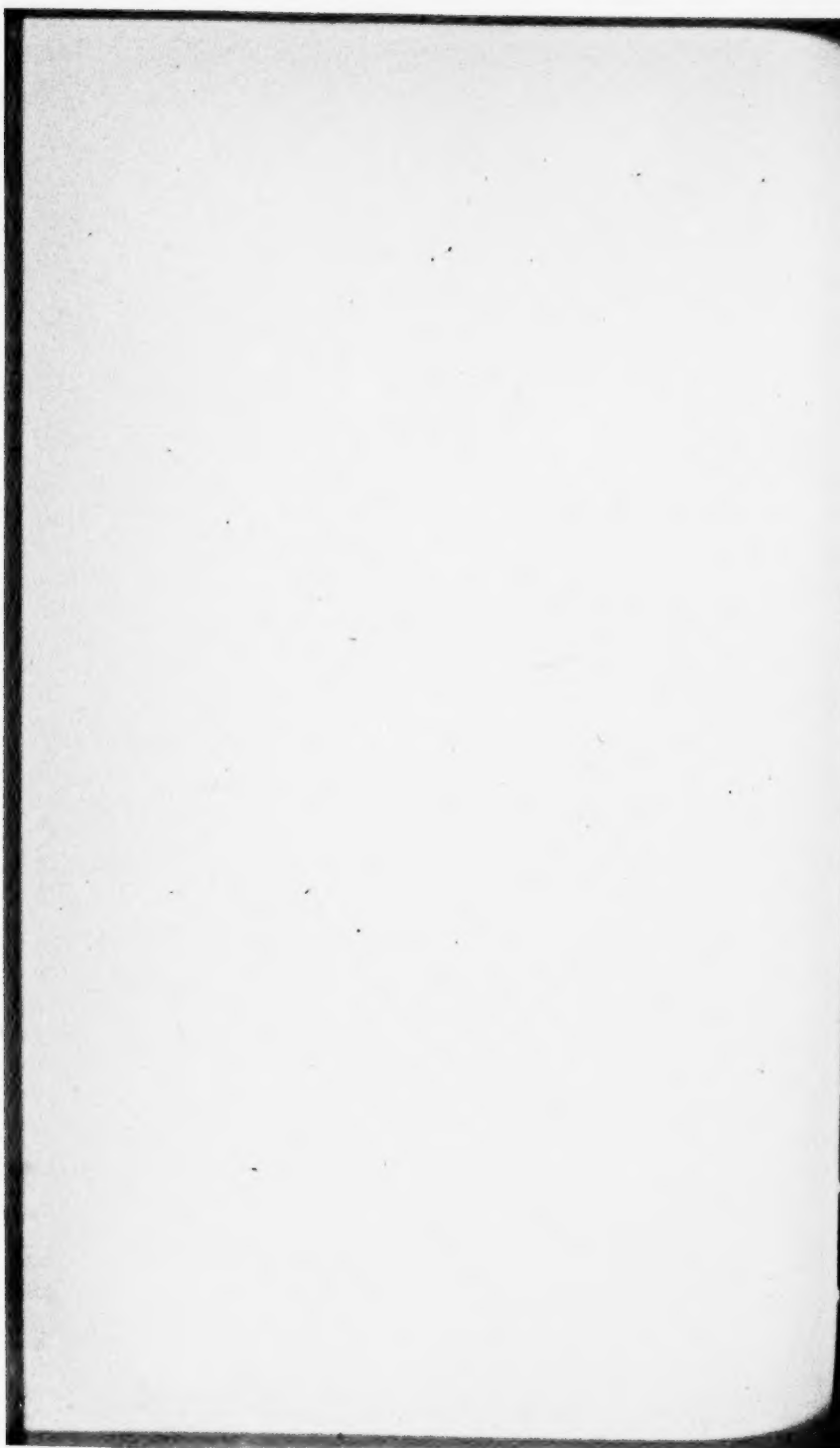
vs.

WILLIAM WATERHOUSE AND ALBERT WATERHOUSE, EXECUTORS UNDER THE WILL AND OF THE ESTATE OF HENRY WATERHOUSE, DECEASED.

**IN ERROR TO THE SUPREME COURT OF THE TERRITORY
OF HAWAII.**

BRIEF FOR PLAINTIFF IN ERROR.

HENRY W. PROUTY,
FREDERIC D. MCKENNEY,
Attorneys for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 508.

WILLIAM W. BIERCE, LIMITED, PLAINTIFF IN ERROR,

vs.

WILLIAM WATERHOUSE AND ALBERT WATERHOUSE, EXECUTORS UNDER THE WILL AND OF THE ESTATE OF HENRY WATERHOUSE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

This case comes before the Court by writ of error addressed to the judges of the Supreme Court of the Territory of Hawaii, and allowed by the Chief Justice of that Court. (R., 781.) It is desired by means of such writ to review a final judgment of the Supreme Court of the Territory of Hawaii entered November 23, 1909, which "affirmed in all things and respects" (R. 767) a judgment of the Circuit

Court of the First Judicial Circuit of the Territory of Hawaii, entered May 29, 1909, pursuant to and in conformity with a prior mandate or remittitur and opinion of said Supreme Court duly filed in the cause by reason whereof a judgment of said Circuit Court entered on the verdict of a jury in favor of William W. Bierce, Limited, plaintiff in error here, for the sum of twenty-eight thousand one hundred and fifty-six $74/100$ (28,156.74) dollars damages, seven hundred and eleven $43/100$ (711.43) dollars attorney's fees or commissions, and eighty-one $45/100$ (81.45) dollars taxed costs,—in all twenty-eight thousand, nine hundred and forty-nine $62/100$ (28,949.62) dollars,—against William and Albert Waterhouse as Executors of the Estate of Henry Waterhouse, deceased (R., 113), was vacated and set aside, and a further judgment was given and entered for and in favor of said Executors of Waterhouse and against the plaintiff William W. Bierce, Limited, “notwithstanding the verdict found by the jury,” for the sum of ten hundred and ninety-seven $22/100$ (1097.22) dollars costs. (R., 126.)

The action or cause in which said judgments were entered was *indebitatus assumpsit* on a “redelivery” or “return” bond in the penal sum of thirty thousand (30,000) dollars, dated July 21, 1903, and executed in favor of William W. Bierce, Limited, a corporation, by Clinton J. Hutchins, Trustee, as principal, and Henry Waterhouse and Arthur B. Wood, as sureties. (R., 21.) The bond was delivered in a replevin suit instituted in the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, by William W. Bierce, Limited, to recover from Clinton J. Hutchins, Trustee, certain property consisting of steel rails, spikes, switch material, cars, locomotives and other railroad construction material claimed as the property of said William W. Bierce, Limited, and alleged to be wrongfully detained by said Hutchins, Trustee, and was conditioned for the delivery of “the said property and all thereof” to said Bierce, Limited, “if such delivery be ad-

judged, and payment to said plaintiff" (Bierce, Limited) "of such sum as may, for any cause be recovered against the defendant" (Hutchins). (R., 21.)

On March 19, 1904, judgment had been entered in the replevin suit by the trial court in favor of the plaintiff, Bierce, Limited, and against the defendant Hutchins, Trustee, for the return forthwith of the property sued for in said action together with \$1,045.00 damages for its detention, and \$50.50 costs, and further that in default of such return, said "plaintiff, William W. Bierce, Limited, have and recover from the said defendant, Clinton J. Hutchins, Trustee, the value of said property found and adjudged herewith to be the sum of \$22,000.00, together with damages for its detention from the first day of June 1903, to the date hereof found and adjudged to be the sum of \$1045.00, together with the costs of this action taxed at the sum of \$50.50". (R., 35, 36).

This judgment, after various vicissitudes of fortune and only after two appeals had been taken to and disposed of by this Court,

Bierce, Limited, *v.* Hutchins, 205 U. S., 340,

Hutchins, Trustee, *v.* Bierce, Limited, 211 U. S., 429

became final and no longer assailable by appeal or writ of error.

In the course of the opinion of this Court disposing of the first of the above-mentioned appeals, Mr. Justice Holmes said:

"The suit was replevin for certain rails, cars, engines and goods, delivered by the appellant (William W. Bierce, Limited,) to the Kona Sugar Company, Limited, and sold by a receiver of that company to the appellee (Clinton J. Hutchins, Trustee,) with full notice of the appellant's claim. Originally there was a contract for the sale of this property for cash, but the Kona Com-

pany having failed to pay, the appellant offered certain 'terms in settlement of the contract' previously made, as follows; 'We will take in settlement of this contract the sum of \$10,000.00, U. S. Gold Coin, and the promissory note of the Kona Sugar Company, Limited, for the sum of \$37,044.53 in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank, in New Orleans, bearing interest at the rate of seven and one-half per cent ($7\frac{1}{2}\%$) per annum, and secured by first mortgage bonds of the Kona Sugar Company, Limited, par value equal to the note, said bonds being a portion of a duly authorized issue not exceeding \$200,000. This offer is conditioned upon its acceptance by you, the payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th A. D. 1901.—Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.' This offer was accepted, this contract took the place of that previously made, and the property was delivered."

Upon consideration of the questions of law involved in that appeal the judgment of the Supreme Court of Hawaii which purported to reverse the judgment of the Circuit Court of March 19, 1904, above referred to, was in turn reversed and the cause was remanded to the Territorial Supreme Court for further proceedings, in conformity with the opinion of this Court.

Such further proceedings were thereupon had in said Court (R., 759-761) that said judgment of March 19, 1904, as above stated, remained in all respects unmodified and final.

Meanwhile, Henry Waterhouse, one of the sureties on the "forthcoming" or "return" bond, had died at Honolulu on or about February 20, 1904 (R., 77), and Clinton J. Hutchins, Trustee, and Arthur B. Wood, the two surviving obligors on said bond, being deemed to be persons of small financial responsibility, and the said Wood having permanently removed himself from the Territory (R., 61, 62), upon motion of the attorneys for the plaintiff, Bierce, Limited, the trial court on the 28th day of March, A. D. 1904, ordered the defendant Hutchins, Trustee, to file in the cause "a new redelivery bond with two sufficient sureties on or before the 2d day of April A. D. 1904" (R., 38, 39). The time so limited for the filing of such new redelivery bond was subsequently enlarged by order of the court, and on April 8, 1904, the defendant, Hutchins, Trustee, having failed to comply with said order, the trial court, on motion of plaintiff's attorneys, entered a further order in the cause directing the issuance of execution on said judgment of March 19, 1904 according to the terms thereof, unless the defendant, Hutchins, Trustee, should file with the Clerk of the Court on or before the 15th day of April, 1904, the requisite new redelivery bond (R., 41, 42).

Said defendant, Hutchins, Trustee, having failed to comply with this last mentioned order, execution upon said judgment in replevin was duly issued, and on May 23, 1904, was duly returned "unsatisfied, being unable to levy upon the properties herein described" (R., 43-45).

The last will of Henry Waterhouse, deceased, having been duly offered for probate (R., 77) the same was in due course "admitted to probate as the last will and testament and codicil thereof of said Henry Waterhouse, deceased," and on the 5th day of April, 1904 letters testamentary were issued to William Waterhouse and Albert Waterhouse, named therein as executors (R., 82).

Said executors, pursuant to the laws of Hawaii, published

the customary notice to creditors of said Henry Waterhouse, deceased, and the plaintiff, William W. Bierce, Limited, within the time limited by law, presented to said executors its claim against the estate, based on said unsatisfied judgment of March 19, 1904, and the redelivery bond above specified, and said claim was rejected (R., 85-92).

Thereafter, said William W. Bierce, Limited, on or about the 11th day of October, A. D. 1904, instituted its action of *assumpsit* based on said "redelivery" or "return" bond to recover against said executors of Henry Waterhouse the sum of \$22,000.00 with interest from the 19th day of March, 1904, and costs of suit (R., 131).

The pleadings will be found at printed pages 129 to 140, inclusive, of the transcript of Record

On the trial of this action, which was had on the 7th day of May, 1908, and subsequent days, the plaintiff Bierce, Limited, introduced in evidence the record in the replevin suit, including said judgment, and the sheriff's return of the execution "unsatisfied", together with the testimony of competent witnesses to the effect that the property in question had not been "returned" or redelivered to plaintiff, in whole or in part, nor had the value thereof, or of any part thereof, been paid to plaintiff, although the amount of the damages awarded by said judgment for the detention of said property, viz., \$1045.00, with costs, \$50.50, and certain interest, \$102.75, had been paid (R., 92, 93, 522).

The defendant Hutchins, Trustee, on his part to maintain a supposed defense based on an alleged tender or offer to return the property in question, offered in evidence the testimony of numerous witnesses and both sides having rested, the trial court charged the jury in material part as follows, the charge of the court being here reproduced at length because of its clear, comprehensive and impartial statement

of undisputed facts, including the history of the main litigation as disclosed by the evidence in this case, and of the contentions of the respective parties concerning the issues joined herein:

"The COURT: Gentlemen of the jury: The court instructs you that the following facts are undisputed in the evidence on this trial, namely:

That Clinton J. Hutchins, trustee, as principal, and Henry Waterhouse and Arthur B. Wood, as sureties, executed to the plaintiff, William W. Bierce, Limited, on July 21st, 1903, the so-called return or redelivery bond mentioned in the evidence; that said bond was executed and delivered to the High Sheriff and filed by him in the action of replevin mentioned in the evidence in which it was entitled, and that the conditions thereof were that if the property in controversy in said replevin suit, and all thereof, should be well and truly delivered to the plaintiff therein, said William W. Bierce, Ltd., if such delivery should be adjudged, and payment to said plaintiff should be well and truly made of such sum as might for any cause be recovered against the defendant, Clinton J. Hutchins, Trustee, then said obligation should be null and void, otherwise to be and remain in full force and effect; Also, that thereafter, on the 19th day of March, 1904, William W. Bierce, Limited, the plaintiff in said action of replevin, recovered judgment therein in this court against the defendant therein, Clinton J. Hutchins, Trustee, adjudging that he forthwith return into the possession of the plaintiff the railroad rails, locomotives, cars, spikes, joints and other railway material constituting all of the property in controversy, and further adjudging that said William W. Bierce, Limited, have and recover from said Clinton J. Hutchins, Trustee, the sum of ten hundred and forty-five dollars as damages for the detention of said property from the 1st day of June, 1903, until the date of said judgment, together with the costs of said action taxed at the sum of fifty dollars and fifty cents; also adjudging that on failure of said Clinton J. Hutchins, Trustee, to forthwith make such return of said property into the possession of said plaintiff, that said plaintiff, William W. Bierce, Limited, have and re-

cover from said defendant, Clinton J. Hutchins, Trustee, the value of said property, found and adjudged to be twenty-two thousand dollars, together with the aforesaid sum of ten hundred and forty-five dollars, damages for detention, and costs taxed at fifty dollars and fifty cents; Also that thereafter, on April 15th, 1904, the special execution introduced in evidence was issued on said judgment, which was, thereafter, on the 23rd day of May, 1904, returned into the court by the sheriff, unsatisfied; Also that thereafter, on exceptions taken and prosecuted by said Clinton J. Hutchins, Trustee, the Supreme Court of the Territory of Hawaii entered judgment in said action of replevin, on the 6th day of May, 1905, reversing the said judgment in this court therein and sustaining the exceptions of the defendant, Clinton J. Hutchins, Trustee, in so far as they raised the question of election, and remanding said suit to this court with directions to enter judgment for the defendant therein, with costs. Also, that thereafter, on the 8th day of April, 1907, on an appeal prosecuted from said judgment of said Supreme Court by said William W. Bierce, Limited, to the Supreme Court of the United States, the latter court entered its judgment therein, reversing said judgment of the Supreme Court of this Territory and awarding to said William W. Bierce, Limited, its costs of said appeal, and remanding said cause to the Supreme Court of this Territory for further proceedings, in accordance with the mandate and opinion of the Supreme Court of the United States filed therein; Also, that thereafter, on the 27th day of September, 1907, the Supreme Court of the Territory of Hawaii, in accordance with said mandate and opinion, entered judgment in said action in favor of said William W. Bierce, Limited, and against said Clinton J. Hutchins, Trustee, for the sum of seven hundred and forty-eight dollars and fifty-seven cents costs, which judgment remains unpaid and unsatisfied; also, that thereafter, in accordance with said mandate and opinion of the Supreme Court of the United States, the Supreme Court of the Territory of Hawaii made and entered an order in said action of replevin overruling the exceptions of said defendant, Clinton J. Hutchins, Trustee, a notice and certified copy of which said order

constituting the mandate of said Supreme Court has been filed in this court in said action of replevin, the effect of which is to leave the said judgment of this court in full force and effect, the same as if no judgment of reversal thereof had ever been rendered by the Supreme Court of this Territory; Also, that on or about the 18th day of April 1904 the defendant, Clinton J. Hutchins, Trustee, paid to the plaintiff, William W. Bierce, Limited, the amount of the damages for detention, ten hundred and forty-five dollars and costs taxed at fifty dollars and fifty cents recovered by the said judgment of this court, together with interest on the value of the property in controversy therein, adjudged to be twenty-two thousand dollars from the date of said judgment, March 1904, until the date of the issuing of said execution, April 15th, 1904, the three items so paid amounting in all to the sum of eleven hundred and ninety-eight dollars and twenty-five cents; aside from which nothing has been paid on said judgment to the plaintiff, William W. Bierce, Limited, and the sum of twenty-two thousand dollars therein adjudged to be the value of the property in question, has not nor has any part thereof, nor interest on said sum since the 15th day of April, 1904, been paid to the plaintiff, William W. Bierce, Limited; Also, that on or about the 20th day of February, 1904, Henry Waterhouse, one of the sureties on said redelivery bond, died at Honolulu, leaving a will, in which he appointed the defendants, William Waterhouse and Albert Waterhouse as executors thereof, and that said will was admitted to probate and letters testamentary thereon were duly granted and issued to said executors by this court on or about the 4th day of April, 1904; Also that thereafter and before the beginning of this action the plaintiff presented to the said executors its claim against the estate of the said Henry Waterhouse, deceased, for the value of said property as so adjudged to be the sum of twenty-two thousand dollars, with interest thereon, which claim was rejected by said executors.

The principal questions which you will have to consider are, whether the property involved in the replevin case has been returned to the plaintiff; or, if not,

whether any actual and sufficient tender of the property was made to the plaintiff by Hutchins.

The court instructs the jury that the said Henry Waterhouse by executing the said redelivery bond, as one of the sureties thereon, in contemplation of law authorized said Clinton J. Hutchins, Trustee, to represent him in said action of replevin, and said Waterhouse thereby became identified with said Clinton J. Hutchins, Trustee, in interest and claimed in privity with him, so as to be concluded by the proceedings and judgment in said replevin suit, and that the record of the proceedings and judgment in said suit are also conclusive and binding upon the defendants in this suit, William Waterhouse and Albert Waterhouse, as executors under the will and of the estate of Henry Waterhouse, deceased.

The court instructs you, that by executing said redelivery bond the obligors therein, including said Henry Waterhouse, admitted that said Clinton J. Hutchins, Trustee, had possession of the property in controversy at the commencement of said replevin suit, and that said property was taken out of his possession when levied upon and seized by the sheriff in said suit, and was returned into his possession by the sheriff upon the execution and delivery of said bond; and that these admissions cannot be controverted on this trial but are binding and conclusive upon the defendants in this suit, who, in respect to any of the matters so admitted, are estopped from alleging that the contrary is true.

The court instructs the jury, with reference to the written offer to return the property in question, signed by Clinton J. Hutchins, Trustee, and delivered to the plaintiff's attorneys, bearing date the 18th day of April, 1904, which has been introduced in evidence by the defendants, that the delivery of this written offer did not alone and by itself constitute a return of the property in question such as to relieve the defendants from liability in this action; and that unless you believe from the evidence that the delivery of said written offer was accompanied by such action on the part of said Clinton J. Hutchins, Trustee, as would enable the plaintiff or its attorneys to obtain actual possession of the

property in question, your verdict should be for the plaintiff.

The court instructs the jury that it is a question of fact for the jury to determine from all the facts and circumstances proved on the trial whether or not said Clinton J. Hutchins, Trustee, made a bona fide tender of the property in question to the plaintiff's attorneys. That in order that an offer such as that introduced in evidence on this trial may constitute such a bona fide tender, it is the law that it must be made in good faith for the purpose and with the intention of putting the party to whom it is made in possession of the property, and that it be not made colorably or for the purpose of laying the foundation for future litigation or defenses, without any intention of actually surrendering the property; and if you believe from the evidence that the offer in question was not made by said Clinton J. Hutchins, Trustee, in good faith for the purpose and with the intention of putting William W. Bierce, Limited, in actual possession of the property in question, your verdict should be for the plaintiff.

In regard to the deed dated June 13, 1903, which is in evidence, by which Clinton J. Hutchins, Trustee, conveyed the property in question to the Henry Waterhouse Trust Company, I instruct you that the recording of that deed in the Registry Office gave notice to the plaintiff that the legal title to the property had been transferred by Hutchins to the Henry Waterhouse Trust Company; and if you find from the evidence that an actual tender was made of the property by Hutchins, and refused by the plaintiff, you may take into consideration the fact that said conveyance to the Waterhouse Trust Company was on record, in deciding whether plaintiff was justified in refusing the tender.

The court instructs the jury, with reference to the question whether or not Clinton J. Hutchins, Trustee, returned the property in question to plaintiff or made an actual tender of the property to the plaintiff in good faith, that the meaning of the conditions of the redelivery bond in evidence was not that said Clinton J. Hutchins, Trustee, would allow the plaintiff, William W. Bierce, Limited, to hunt up the property and get it if it could, but was that he would return it to the

plaintiff, if the plaintiff succeeded in the action of replevin, and, while it is true that the property in question was so heavy and bulky as to make it difficult of actual manual delivery, and that the rule as to delivery is less strict as to such property than as to smaller articles, still it was the duty of Clinton J. Hutchins, Trustee, to take such action as would enable the plaintiff to obtain actual possession of the property, and unless the jury believe from the evidence that he had done this then he had not returned the property to the plaintiff within the meaning of the statute and the conditions of the bond, and your verdict should be for the plaintiff.

The court instructs the jury that the judgment in the replevin suit imposed upon Clinton J. Hutchins, Trustee, the duty of taking active measures to surrender the property to William W. Bierce, Limited, and not merely the duty of passive submission to a forcible taking of the property by legal process. Under the law it was the duty of Clinton J. Hutchins, Trustee, to seek William W. Bierce, Limited, or its representatives, and deliver the property to them, if they would receive it; and if the jury believe from the evidence that he failed to do this such failure constituted a breach of the conditions of the bond, rendering him and his sureties liable.

The mere writing and sending of a letter to the plaintiff's attorneys that the property was offered and delivered to the plaintiff would not be sufficient. When the judgment was entered in the replevin action in favor of the plaintiff, it became the duty of the defendant Hutchins to redeliver the property to the plaintiff or pay its value. The writing of such a letter would not amount to a delivery unless Hutchins followed it up and supplemented it with active steps to secure to the plaintiff an actual delivery of the property. In this connection you are entitled to take into consideration any evidence which may tend to show whether at the time any such offer was made the property was on land belonging to Hutchins or on land belonging to other persons and over which he had no control. The plaintiff was not required to go upon the lands of third persons to locate the property and get it if it could.

An offer or tender to deliver property in order to be effectual must be made in good faith. Whether or not the offer claimed to have been made by Hutchins to return the property in question was made in good faith is for you to decide upon the evidence in this case. In this connection you should consider whether it has been shown that at the time the offer was made Hutchins had authority to return the property.

I instruct you that under the judgment which was rendered in the replevin case it became the duty of the defendant to return all of the property in question. The plaintiff was not required to accept a portion of it, nor was the sheriff authorized to accept any portion of it less than the whole. If, therefore, you believe from the evidence that a part only of the property was tendered, or that some of it was so situated that it could not for any reason be delivered by Hutchins to the plaintiff, your verdict must be for the plaintiff.

I charge you that the return of the deputy sheriff is indorsed on the execution, to the effect that he as unable to levy the writ on the property therein described and that he therefore returned the writ unsatisfied, is a part of the record of this court in the replevin case, and as such it imports absolute truth and is binding and conclusive on the defendants as to all acts done under and pursuant to the writ while it was in the hands of the deputy sheriff. You are therefore instructed, in considering your verdict, to disregard all testimony that you may find which tends to contradict the return of the deputy sheriff relating to the time the execution was in his hands.

The court instructs the jury that nothing short of an absolute or unconditional tender of the property in question to the plaintiff would relieve the obligors on the bond from liability to the plaintiff for the value of the property, and if you believe from the evidence that the offer of Hutchins to return the property in question to the plaintiff was made upon any conditions or condition, then it would not constitute a defense to this action.

I insruct you that upon the return of the execution in evidence in this case, the right at once accrued to the plaintiff to maintain its action against the principal

and sureties on the redelivery bond for the value of the property as fixed in the judgment in the replevin case, with legal interest thereon and such costs as may have been properly taxed against the defendants in that case, and nothing less than the payment of such value, interest and costs would constitute a defense to this action.

* * * * *

The court instructs the jury that the fact that the suit was discontinued during the trial as against the defendants Clinton J. Hutchins, Trustee, and Arthur B. Wood, the two surviving obligors on the redelivery bond mentioned in the evidence cannot properly be considered by the jury in reaching a verdict in this case; that the plaintiff could not properly have proceeded to trial against the present defendants without discontinuing its suit as against said survivors, and the jury will not consider such discontinuance as a circumstance unfavorable to the plaintiff's case or as any evidence of an intention on the part of the plaintiff to release said obligors from their liability on said bond, if the jury believe from the evidence that they are liable thereon; and the jury are instructed to disregard any and all remarks made by counsel in the presence or hearing of the jury to the effect that such discontinuance tends to prove an intention on the part of the plaintiffs to release said surviving obligors.

* * * * *

In regard to the document which has been received in evidence, dated April 14, 1904, being an option given to the Kapiolani Estate by the plaintiff for the sale of the property in question, I charge you that the court having decided in the replevin case that the property belonged to the plaintiff, the plaintiff had the right to sell it or give an option on it whether plaintiff had actual possession of it at the time or not, and the option in question or any similar option could therefore have been given without prejudicing in any way the plaintiff's claim that Hutchins had not made a redelivery of the property.

* * * * *

The court instructs the jury that in determining the weight to be given to the testimony of the several wit-

ness you should take into consideration their interest in the event of the suit, if any such is proved; their apparent candor or lack of candor, their apparent fairness or bias, if any such appears; their appearance and manner on the stand; the reasonableness or unreasonableness of the story told by them, and all the facts and circumstances tending to corroborate or contradict such witnesses, if any such are proved.

The court instructs you that in passing upon the testimony of the witnesses you have a right to take into consideration any interest which such witnesses may have in the result of this suit, if any is proved, and to give to the testimony of such witnesses only such weight as you think it entitled to under all the circumstances proved on the trial.

The court instructs the jury that while it is the duty of the jury to carefully scrutinize and dispassionately weigh the evidence of all the witnesses in the case, still it is your sworn duty to give proper credit to the evidence of each and all of the witnesses, and, if possible, to reconcile all of the evidence in the case with the presumption that each witness has intended to speak the truth, unless by their manner of testifying on the witness stand, or by inconsistent statements sworn to, or by testimony inconsistent with other credible evidence in the case, you are led to believe that the testimony of some one, or more, of the witnesses is untruthful or unreliable, or unless you are led to believe, from a manifestation of interest, bias or prejudice that such witness or witnesses have been inclined to exaggerate, color or suppress the truth, or unless they have been impeached in some of the modes known to the law.

The court instructs the jury with reference to all questions to which objections have been sustained by the court and all testimony of witnesses which has been stricken out by the court, as well as with reference to all papers and documents which have been offered but not received in evidence, that the jury should disregard all such matters as well as all remarks of counsel in relation thereto, if any have been made, and should consider only the evidence actually introduced on the trial in arriving at their verdict.

* * * * *

If the jury find the issues for the plaintiff, by their verdict, they should assess the plaintiff's damages in their verdict at the sum of Twenty-two Thousand dollars, determined to be the value of the property in question by the judgment in replevin, with interest thereon at the rate of six per cent per annum from April 15th, 1904, to which should be added seven hundred and forty-eight dollars and fifty-seven cents, the amount of the judgment for costs rendered by the Supreme Court of the Territory on September 27th, 1907, in favor of William W. Bierce, Limited, and against Clinton J. Hutchins, Trustee, with interest thereon at the rate of eight per cent per annum from September 27th, 1907, aggregating the sum of \$28,156.74.

I instruct you that the plaintiff must prove its case by a preponderance of evidence, and the burden of the proof is upon it. If it does not establish its case by such preponderance of evidence, then your verdict must be for the defendants.

I instruct you that it is not necessary, in order to discharge the sureties from liability in this case, that a redelivery of the goods should be made. The condition of the bond would be satisfied, so far as the sureties were concerned, by a valid tender made in good faith by the principal on the bond; and if you find that such valid tender was made your verdict must be for the defendants.

In making such tender, where the goods are of the character of these in suit, it is not necessary to make a manual delivery. It is enough that they be tendered to be delivered in the same condition and at the same place as they were at the time the re-delivery bond was given.

The plaintiff, the obligee of the bond, is bound to act in good faith and with reasonable promptness towards the defendants in this action, whose testator, Henry Waterhouse, was a surety; and in case you find that a valid tender was made, as I have already instructed you, the plaintiff was bound in good faith to such surety and his representatives to accept or reject it promptly.

I instruct you that in this action on the redelivery bond it is not necessary that a tender of property con-

cerning which the bond was given should be kept good, and therefore if you find from the evidence that a valid tender of the property was once made by the principal obligor of the bond, Clinton J. Hutchins, Trustee, or his agent, to William W. Bierce, Ltd., or its agent, then and thereafter there was no obligation or liability upon the part of Clinton J. Hutchins, Trustee, as far as the rights of his sureties are concerned to keep the property in a position to deliver it up to William W. Bierce, Ltd., for a valid tender once made which is refused by the creditor, William W. Bierce, Ltd., in this case, will discharge and release he surety, Estate of Henry Waterhouse in this case, at once from all liability on the redelivery bond, and your verdict should be for the defendants.

I instruct you that the plaintiff, William W. Bierce, Ltd., being a corporation and only able to act through its officers or attorneys or agents, that all evidence as to the acts of its officers, attorneys and agents are to be considered by you as the acts of the corporation itself on the question as to whether the corporation plaintiff acted in good faith toward the surety on the redelivery bond, Henry Waterhouse, deceased, in all matters connected with the replevin suit and the judgment obtained in such replevin suit.

Although, gentlemen of the jury, I have heretofore instructed you that certain facts are undisputed in the evidence on trial, there are however certain other facts which are also undisputed in the evidence, which are as follows:

That prior to and at the time of the execution of the redelivery bond, William W. Bierce, Ltd., had knowledge of the situation of the property in question in Kona, Hawaii, that said property was not piled up or stored, but was laid down and used as a plantation railway and equipment; and that at no time during the replevin action or the times referred to in the evidence in this action on the bond was any of said property removed away from the premises or so called Kona plantation; that at the time the special execution introduced in evidence was issued on said judgment on April 15th, 1904, the defendants had appealed to the

Supreme Court of Hawaii from the judgment of the Circuit Court which had issued such execution.

* * * * *

You may retire now, gentlemen." R., 521-530.

At the close of all the evidence, both parties having rested, and before the giving of the foregoing charge, the attorneys for defendants had moved the court to direct a verdict in their behalf, upon the following grounds, viz:

"First. The sureties, and particularly the sureties represented by William Waterhouse and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, and Mr. Waterhouse, particularly applying to Mr. Henry Waterhouse in his lifetime, having executed a redelivery bond conditioned on the affidavit of plaintiff in the replevin action, and the complaint of plaintiff setting forth the actual value of the property sought to be replevined at \$15,000, and the fact that the complaint in said replevin action was thereafter amended to show, first the actual value of \$20,000, and, second, said complaint was thereafter again amended in said action to show a value for \$22,000, and the judgment in said action thereafter rendered for \$22,000, the surety was thereby released by said amendments under the circumstances.

"Second. The cause of action alleged in the complaint in the replevin action at the time of the execution and delivery of the redelivery bond was by subsequent events changed and judgment was rendered on the amended cause of action, the sureties thereby released.

"Third. The property sought to be replevined had not been seized by the sheriff according to the statute at the time of the delivery of the redelivery bond, and the sureties consequently not liable under the bond.

"Fourth. The judgment of May 6th, 1905, by the Supreme Court of the Territory of Hawaii in the replevin action of Bierce against C. J. Hutchins, trustee, released the defendant sureties in this action.

"Fifth. If such judgment did not release the sureties, then such judgment at least makes the commencement of this action on the bond premature.

"Sixth. Or at least shows that no proof has been introduced by plaintiff's testimony showing breach of conditions of bond by defendant Hutchins, trustee.

"Seventh. This action on the bond cannot be maintained as no claim has been presented to or suit brought against the executors under the will and of the estate of Henry Waterhouse, deceased, according to the statute relative to claims against the estates of decedents.

"Eighth. This action on the bond is prematurely brought against the executors under the will and of the estate of Henry Waterhouse, deceased.

"Ninth. This action was prematurely brought against all parties defendant.

"Tenth. The sureties are released by change of venue from the Third Circuit to the First Circuit Court of the Territory of Hawaii without the consent of the sureties in the replevin action of Bierce against Hutchins, trustee.

"Eleventh. The sureties are released by waiver of a jury trial by plaintiff in the replevin action of Bierce, Ltd., against Hutchins, trustee.

"Twelfth. The surety represented by the executors under the will and of the estate of Henry Waterhouse, deceased, is released by the discontinuance of this case as to C. J. Hutchins, trustee, and A. B. Wood.

"Thirteenth. That the evidence shows the sureties were released by the acts of C. J. Hutchins, trustee, and the plaintiff, its agents and attorneys in relation to the property for which the return or redelivery bond was given." R., 103, 104.

This motion was denied by the trial court and an exception to the ruling was duly noted. R., 103, 104.

The jury having retired, returned a verdict in favor of the plaintiff William W. Bierce, Limited, as follows, viz:

"We, the Jury in the above entitled cause find for the plaintiff and against the defendants Wm. Waterhouse and Albert Waterhouse as executors under the will and of the Estate of Henry Waterhouse deceased for the sum of \$22,000.00 with interest thereon at the rate of 6% per annum from April 15th, 1904, also for

the sum of \$748.57 with interest thereon at the rate of 8% per annum from September 27th, 1907, the aggregate sum of the principal and interest being \$28,156.74. Honolulu, T. H., May 22nd, 1908." R. 105.

Defendants' attorneys thereupon moved the court for judgment *non obstante veredicto* upon the following, among other grounds, viz:

"7. Because the affidavit in replevin and the complaint based on the affidavits setting out the sworn value of the property in suit, upon which affidavit and complaint by law the re-delivery bond is based, which bond recites that the property is 'of the value of \$15,000, as stated in the affidavit filed herein,' is and are judicial admissions made by the plaintiff in this action upon which the sureties in signing said re-delivery bond had a right to rely, and as to the sureties, the defendants in this action the plaintiff is estopped to claim that the value of said property is more than \$15,000; and the subsequent proceedings by which the allegations of said complaint were amended to increase the alleged value first to \$20,000 and then to \$22,000, and the recovery of judgment for \$22,000 as to the value of said property, operated to release the sureties from the obligation of said re-delivery bond and are not binding against said sureties, the defendants in this action." R. 105, 107.

This motion having been overruled (R., 108) and a motion for a new trial having been adversely disposed of, (R., 112) judgment was entered on the verdict May 29, 1908, in the following form:

"This action by complaint- as amended, claiming Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages, came to the September Term A. D. 1904, and thence by continuance to the present Term, when the parties appeared, and were at issue to the jury.

Said cause having been heard and committed to the jury, they find for the plaintiff to recover Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages.

Therefore it is ordered and adjudged by the court that the plaintiff, William W. Bierce, Limited, do have and recover from the defendants, William Waterhouse and Albert Waterhouse as Executors under the Will and of the Estate of Henry Waterhouse, deceased, Twenty-eight Thousand One Hundred Fifty-six and 74/100 Dollars (\$28,156.74) damages, together with its attorneys' fees or commissions taxed at Seven Hundred Eleven and 43/100 Dollars (\$711.42) and its costs taxed at \$81.45 to be paid in due course of administration." R. 113.

To test the validity of this judgment the defendant, Hutchins, trustee, filed and perfected a bill of exceptions to the Supreme Court of the Territory of Hawaii. That document contained upward of one hundred and thirty (130) exceptions to the rulings of the trial judge in the course of the trial and to the action of the trial judge in overruling the plea in abatement, and on defendants' motion for judgment *non obstante veredicto*. This bill of exceptions in its entirety appears in the printed transcript of record before this court at pages 533 to 685, inclusive. Upon hearing this bill of exceptions in the Supreme Court of the Territory of Hawaii, that court, by a majority judgment, sustained "the exception to the overruling of defendants' motion for judgment *non obstante veredicto* in so far as it is based upon the discharge from liability by the plaintiffs' amendments of value" (R., 121, 125) made in the complaint in the replevin action:—"the remaining grounds of the motion and the remaining exceptions not necessarily involved" were "not passed upon" (R., 121).

Upon remittitur to the trial court that court, in obedience to the mandate, and in conformity with the opinion of the Territorial Supreme Court filed April 12, 1909, vacated and set aside the judgment entered May 29, 1908, on the verdict of the jury and further "ordered and adjudged that the plaintiff (William W. Bierce, Limited) take nothing by its writ, and that the defendants (William and Albert Waterhouse,

executors, etc.) recover of and from the plaintiff their costs, taxed at the sum of \$1,097.22."

The opinion of the Supreme Court (Ballou, J., with whom concurred Hartwell, C. J.), together with the dissesing opinion of Wilder, J., are as follows (R., 114, 121).

Opinion of the Court by Ballou, J.

This is a bill of exceptions to review a judgment against the defendants, as executors of the will of Henry Waterhouse, upon a return bond in a replevin action executed by Henry Waterhouse as surety.

The replevin action was brought by the plaintiff against Clinton J. Hutchins, trustee, on July 20, 1903, and was for the recovery of certain railway material which had been used by the Kona Sugar Co., Ltd., the property of which corporation had been bought by Hutchins at a receiver's sale. Plaintiff alleged in its declaration that the actual value of the property was \$15,000, and filed its affidavit in conformity with R. L. Sec. 2102, then Civil Laws, Sec. 1695, alleging, in conformity with the statutory requirement of "the actual value of the property" that the actual value of the property was \$15,000 and tendered its bond in double that amount. Hutchins thereupon elected to retain possession of the property under R. L. Sec. 2112 by giving the return bond upon which the present action is founded, which reads as follows:

Circuit Court, Third Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.

CLINTON J. HUTCHINS, Trustee.

(\$1.00 stamp.)

Replevin.

Return Bond.

Know all men by these presents:

That we, Clinton J. Hutchins, Trustee, as principal, and Henry Waterhouse and Arthur B. Wood as sureties,

are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns, in the sum of Thirty thousand (30,000) Dollars for the payment of which well and truly to be made, we bind ourselves, our successors herein and administrators jointly and severally firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover, from him certain property specifically set forth in the bill of complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his deputies, and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

Now, therefore, if the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

CLINTON J. HUTCHINS, *Trustee*.
HENRY WATERHOUSE, *Surety*.
ARTHUR B. WOOD, *Surety*

The foregoing bond is approved as to its sufficiency of sureties.

Dated July 21, 1903.

A. M. BROWN,
High Sheriff.

(Endorsed:) Filed, August 1st, 1903, 7 o'clock A. M.
J. P. Curts, Clerk.

Before going to trial plaintiff amended his declaration by increasing the allegation of the actual value of the property from \$15,000 to \$20,000, which amendment was allowed by the court March 7, 1904, and at the close of his case by again increasing the value to \$22,000, which amendment was allowed March 19, 1904. The case was tried, jury waived, and plaintiff recovered judgment for the return of the property with \$1045 damages and \$50.50 costs, with an alternative judgment in case of failure to return for \$22,000, the adjudged value of the property, with the same damages and costs. Certain exceptions brought by the defendant Hutchins were sustained by this court, the decision being rendered January 28, 1905. *Bierce v. Hutchins*, 16 Haw. 418. At that time this was the court of final appeal in the case, no federal question being involved. On March 3, 1905, an act of congress was passed allowing appeals from this court in cases involving over \$500. (33 Stat. 1035, c. 1465, sec. 3.) After a petition for rehearing decided April 29, 1905, (*Bierce v. Hutchins*, 16 Haw. 717), the plaintiff stated that it would have no further evidence to present if the case were remanded and asked that a judgment remanding with direction to enter judgment for the defendants, be entered in this court which, in the absence of objection from the defendant in the action, was done. An appeal from this judgment was allowed by the Supreme Court of the United States and the judgment reversed. *Bierce v. Hutchins*, 205 U. S. 340. This court then held that the defendant in that action was entitled to a hearing upon exceptions not passed upon at the first hearing (*Bierce v. Hutchins*, 18 Haw. 374), but after hearing overruled the exceptions. (*Bierce v. Hutchins*, 18 Haw. 511.) An appeal from this decision was dismissed (*Hutchins v. Bierce*, 211 U. S. —, December 14, 1908.)

Meanwhile Henry Waterhouse had died February 20, 1904, and the present defendants qualified as his executors. After the trial of the replevin action the plaintiff caused execution to be issued April 15, 1904, notwithstanding the pendency of the defendant's exceptions. The statute allowing this procedure upon good cause shown (R. L. Sec. 1861) had been passed April 22, 1903, before the execution of the bond now sued upon,

but went into effect August 1, 1903, the day the bond was filed and a few days after its execution. The execution having been returned unsatisfied, the present action, joining Hutchins, Wood and the executors of Henry Waterhouse as defendants, was filed on October 11, 1904, at which time the exceptions in the replevin action were pending in the Supreme Court of the Territory. A demurrer was overruled and the defendants answered. Before the case was brought to trial the Supreme Court of the Territory sustained the exceptions in the replevin action whereupon the defendants in the action on the bond pressed for trial, but continuances were granted by the court until after the first decision of the Supreme Court of the United States and the subsequent overruling of the remaining exceptions by this court. Upon a suggestion of misjoinder plaintiff discontinued as to Hutchins and Wood and proceeded solely against the Waterhouse executors. The case was tried before a Jury in May, 1908, the principal issue of fact being whether or not there had been an actual redelivery of the property in April or May, 1904, after the judgment of the circuit court. The jury found for the plaintiff for the sum of \$22,000 with interest at six per cent. from April 15, 1904, also for the sum of \$748.57 with interest at eight per cent. from September 27, 1907, the aggregate of principal and interest being \$28,156.74. The smaller item was composed of costs in the United States Supreme Court and of costs in the Supreme Court of the Territory, the damages in the replevin action having been paid.

The bill of exceptions brings up 127 exceptions, most of which were argued and relied upon. Many of these, however, relate to the same points, the principal defenses of the sureties being that they were discharged by the amendment to the local statute allowing execution to issue in certain cases pending exceptions; that they were discharged by the amendment to the Organic Act allowing an appeal to the Supreme Court of the United States in cases involving over \$5000; that they were discharged by plaintiff's successive amendments to its declaration whereby the alleged value of the property was increased from \$15,000 to \$22,000; that the suit was prematurely brought against these executors; and that

the law laid down by the trial court as the obligor's duty to return the property after judgment was inapplicable and misleading in view of certain correspondence in which Hutchins purported to deliver the property with certain conditions, which delivery was accepted by the plaintiff upon other conditions.

We find it necessary to consider only those exceptions which go to the amendments of value made by the plaintiff. This defense of the sureties is based upon the fact that the plaintiff in its replevin affidavit swore that the actual value of the property was \$15,000, which fact is recited in the condition of the redelivery bond, the plaintiff's declaration containing the same allegation. After the execution of the bond the plaintiff amended the allegation in his declaration first to \$20,000 and afterwards to \$22,000. The prayer of the declaration was for judgment for the return of the property, with damages for detention and costs, but according to the practice in replevin, by which an alterantive cash judgment for the value of the property was rendered in default of the return of the property, the amendments amounted to an increase of the *ad damnum*, and the sureties claim that this is an alteration of their contract, and an increase in the risk assumed by which they are discharged from liability.

The question thus raised is one of considerable difficulty, and one on which the decisions are conflicting. The contract of the surety may be with reference to another contract, usually called the principal contract, between the principal and a third party, as a bond to secure the performance of a building contract; or on the other hand it may be with reference merely to an undertaking of the principal, as a bond that he will appear in court or that he will pay a judgment which may be rendered against him. The rule that any "alteration in the contract" releases the surety is frequently stated, but it is not always clear whether the contract referred to is the principal contract or the bond of the surety, or whether in the case of a surety for an undertaking the word contract is not used to mean either existing circumstances or the terms upon which performance may be demanded. In the case of a surety upon a contract any alteration in the principal contract releases the surety,

the commonest case being an agreement between the principal and the third party modifying the terms of the principal contract. *United States v. Freely*, 186 U. S. 309. Another kind of "alteration of contract" is an alteration made on the face of the bond itself (*Martin v. Thomas*, 24 How. 315; *Smith v. United States*, 2 Wall. 219) or upon the face of an instrument referred to in the bond. *Miller v. Stewart*, 9 Wheat. 680. In the latter case, the instrument appointing a deputy collector was altered by the addition of a ninth township to the eight specified. The court lays some stress upon the alteration being on the face of the instrument, but the case has been widely cited and applied where there was no such technical alteration, but where a modification of the duties of the principal or of the terms of the undertaking guaranteed by the sureties has been held to be an alteration of the contract. Thus in *Reese v. United States*, 9 Wall. 13, the bond was for the appearance of a defendant at designated term of court in San Francisco 'and at any subsequent term to be thereafter held in that city.' A stipulation between the district attorney and defendant's counsel, approved by the court, that the case should be brought to trial only after final decree in certain civil actions and provided they were against defendant was held to discharge the sureties, the court saying:

"It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharged them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound

by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

Here there was no alteration in the sureties' contract, and there was no contract, in the ordinary sense of that word, between the defendant and the district attorney which was subsequently altered. There was a modification, by proper authority, of the terms of the principal's undertaking to appear, which was held to be an entire discharge of the contract of the sureties. We dwell on this distinction because the use of the word contract in this connection appears to be the source of some confusion. In *United States v. Backland*, 33 Fed. 156, for example, the "contract" held to be changed had been fulfilled. A more accurate statement of the effect of the decisions of the Supreme Court is as follows:

"They have decided that the surety is discharged not merely by payment of the debt or a release of the principal, but by any material change in the relations between the principal and the party to whom he owes a debt or duty; and that the surety cannot be held in such case by showing that the change was not injurious to him. For he had a right to judge for himself of the circumstances under which he was willing to be liable, and to stand upon the very terms of his contract." 2 Parsons Contracts 17.

Upon the precise question of the effect of an increase of the ad damnum upon a bond previously executed there is a conflict of authority. The majority of the cases hold the sureties are not discharged. Thus in *New Haven Bank v. Miles*, 5 Conn. 587, where the defendant had been arrested in a civil action and the bail bond was conditioned only for his appearance in court, an increase from \$600 to \$1200 was held not to discharge the sureties, the court holding that they assumed the risk of all amendments allowed by statute. In *Carr & Hobson v. Sterling*, 114 N. Y. 558, another case of arrest on civil process, the undertaking provided that the defendant "shall at all times render himself amenable to any mandate which may be issued to enforce final judgment against him in the action." The ad damnum was in-

creased from \$7000 to over \$13,000 and after judgment by default the sheriff returned "defendant not found." The surety was held liable, but there is no distinction taken between the rights of the surety and those of the principal. In these two cases there was no undertaking in the bond to pay the amount of the judgment recovered.

In *Hare v. Marsh*, 61 Wis. 435, an amendment of the ad damnum in the justice's court on an action of tort to an amount in the Circuit Court beyond the justice's jurisdiction was held not to release the surety on the bond given to stay execution pending the appeal, the undertaking of the bond being to pay any judgment remaining unsatisfied. The court says: "The undertaking presupposes the exercise of such authorized judicial powers as should be called into action in the case. The contract was impliedly, if not expressly, with reference to such exercise of judicial power." Exactly the opposite result was reached in *Evers v. Sager*, 28 Mich. 47, although there is a dictum to the effect that the sureties would have been bound had the amendment been within the power of the court irrespective of stipulation. In Massachusetts a statute (Pub. Sts. c. 167, sec. 42) is construed as binding sureties in the event of amendments, provided it appears that the amended cause of action is the same as that relied on by the plaintiff when the action was commenced, however the same may be misdescribed. If the sureties are notified of the proposed amendment they are bound by its allowance, subject to exception or appeal; if not notified they are still liable if it appears that the adjudication was correct, and the court may go outside the record and receive oral testimony as to what was the cause of action intended to be relied on when the suit was commenced. *Driscoll v. Holt*, 170 Mass. 262. The issue under this statute is therefore merely whether a new cause of action has been introduced and decisions upon one side or the other (*Prince v. Clark*, 127 Mass. 599; *Townsend Bank v. Jones*, 151 Mass. 454) are not helpful. In Maine an increase of the ad damnum upon the same demand discharges the sureties upon a bond given with reference to the action (*Langley v. Adams*, 40 Me., 125), and the same principle was applied where the creditor,

without amendment, took judgment in excess of his ad damnum. *Ruggles v. Berry*, 76 Me. 262.

The only principle that can be deduced from the cases holding the sureties liable is that sureties on judicial bonds, as distinguished from sureties on private contracts or undertakings, contract with knowledge of the power of the court, under statute or otherwise, to make amendments, and must be presumed to take the risk of such amendments even if their liability is thereby increased. If this principle is sound it would be of much wider application than cases of the increase of ad damnum, yet outside that field it is seldom recognized and the distinction generally denied. *Brandt, Suretyship*, Sec. 511; *Reese v. United States*, quoted above. One of the most common amendments under statutes is the substitution of new parties, and yet this is generally held to discharge the sureties *Richards v. Storer*, 114 Mass. 101; *Tucker v. White*, 5 Allen 322. Contra, *Jamieson v. Capron*, 95 Pa. St. 15. The correction of an error in the description of the property replevied as the substitution of "north-east" for "south-east" in the quarter section from which logs were cut is well within the power of amendment, but discharges the sureties. *Bolton v. Nitz*, 88 Mich. 354. The surety on a judgment for alimony or on a temporary injunction knows that it may be modified by the court, yet he is discharged by such modification. *Sage v. Strong*, 40 Wis. 575; *Tyler Mining Co. v. Last Chance Mining Co.*, 90 Fed. 15. Sometimes, of course, the language of the bond, by fair construction, shows that subsequent increase of risk has been assumed as where the condition that a distiller "shall in all respects faithfully comply with all the provisions of law," etc., has been held to signify an intention to stipulate that the principal should comply with duties subsequently imposed by law. *United States v. Powell*, 14 Wall. 493.

The rule of *strictissimi juris* has been said to be a stringent one, and liable at times to work a practical injustice. With regard to subsequent amendments in judicial proceedings we should hesitate to apply it except when it resulted in a variation of risk which was plainly outside the contract of the sureties. Even an increase of the ad damnum might not have that effect,

as when the cause of action is certain drafts with interest thereon, and the ad damnum is increased to cover interest subsequently accruing. *Townsend Bank v. Jones*, 151 Mass., 454. Here the surety was fairly apprised of his risk at the outset and the amendment was to satisfy legal formality. The case at bar is quite different. It is impossible to read the bond without inferring that the value therein recited, fixed by the plaintiff itself, was part of the material inducement upon which the sureties assumed the risk. The responsibility for "such sum as may for any cause be recovered against the defendant" evidently refers to recovery upon the action recited. *The Oregon*, 158 U. S., 186, 206. The risk in this case was to be responsible for the return of property, of a specified value, or in default thereof for the payment of a judgment for its value, together with damages, interest and costs. The penal sum of the bond, \$30,000, was the limit of the risk, not the risk itself. The subsequent amendments were not the exercise of a judicial power for which neither party was responsible, but the voluntary act of the obligee, the allowance by the court being formal and largely controlled by statute. R. L., Sec. 1738. By these amendments, in this case made after the death of the surety whose estate is now sought to be charged, the plaintiff increased the risk of the sureties nearly fifty per cent., and actually obtained a judgment for \$22,000 with damages and costs. We are of the opinion that this increase of liability was outside the contract of the sureties and that they are discharged.

The exception to the overruling of defendants' motion for judgment non obstante veredicto, in so far as it is based upon their discharge from liability by the plaintiff's amendments of value, is sustained. The remaining grounds of the motion and the remaining exceptions not necessarily involved are not passed upon.

Dissenting Opinion of Wilder, J.

The surety in this case agreed to pay "such sum as may, for any cause, be recovered against" Hutchins. The limit of that obligation was stated in the bond to be \$30,000. Plaintiff having recovered against Hutchins the sum of \$22,000, the surety is bound by his obli-

gation to pay that sum. The conclusion of the majority of the court that the surety is discharged is based on the assumption that the surety's risk was increased by the amendments in the replevin action raising the value of the property from \$15,000 to \$22,000. That assumption very properly requires that the risk or obligation of the surety should be stated differently from what it is in the bond under the statute. If the obligation of the surety was as stated by the majority, then the conclusion they reach logically follows. If, on the other hand, it was as stated in the bond and in the statute, that conclusion does not and cannot logically follow. To be sure the obligation and the limit of that obligation are different things. The obligation is to pay such sum as may be recovered, while the limit provides that in no event can that sum, so far as the surety is concerned, be more than \$30,000.

From the cases referred to by the majority it appears that the courts in Massachusetts, Connecticut, New York, Wisconsin, Pennsylvania and, possibly, Michigan, to which should be added Ohio, Indiana and Vermont. (*Jaymes v. Platt*, 47 Oh. St. 262; *Sherry v. Bank*, 6 Ind. 397; *Wright v. Brownell*, 3 Vt. 436.) would hold that in this case the surety was not discharged, while in Maine it would be held the other way. The two cases of *Sage v. Strong*, 40 Wis. 575 and *Tyler Mining Co. v. Last Chance Mining Co.*, 90 Fed. 15, are easily distinguishable from the case at bar. In the first one the surety obligated himself to see that a judgment which had already been rendered would be paid, while in the second case the obligation of the surety was to pay any damages caused by an injunction which had already issued. The surety in each case knew when he signed the bond that the judgment or injunction could be modified by the court, but he never agreed to be bound by a modification any more than he agreed to be bound in case a different judgment or injunction was thereafter entered. That is something entirely different from the case where a surety knows when he executes the bond that he is to be liable if at all to pay a judgment to be rendered in the future and, it must be remembered, in the usual course of procedure, which would include amendments of the kind made.

The majority opinion being in my opinion contrary to both principle and the great weight of the decided cases, I am compelled to dissent therefrom.

To the entry of judgment on the remittitur from the Supreme Court of the Territory in conformity with the opinion of the majority the plaintiff, William W. Bierce, Limited, duly excepted "on the ground that the same is contrary to law", and such exception was formally allowed and noted of record by the court (R., 127).

Thereafter, plaintiff's bill of exceptions (R., 8-128) having been duly approved by the trial court (R., 128), upon application of said plaintiff a writ of error "for the removal of the record, proceedings and judgment in the original cause, from the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, to the Supreme Court of the Territory of Hawaii" was duly issued and duly served (R., 3, 7).

The substantial error formally assigned "at the time of procuring said writ of error" was that said Circuit Court had

"erred in rendering judgment *non obstante veredicto* in said cause in favor of the defendants and against the plaintiff, and in adjudging that the judgment entered in said cause on the verdict on the 29th day of May A. D. 1908, be vacated and set aside, and in adjudging that the plaintiff take nothing by its writ and that the defendants recover from the plaintiff their statutory attorneys' fees and costs of suit as taxed." (R., 4).

The record on this writ of error having been duly docketed in the Supreme Court of the Territory, a *pro forma* judgment of affirmance was entered by that court (R., 174) but same was subsequently "vacated, annulled and set aside" and the hearing of the cause was "continued till the return of Chief Justice Hartwell," (R., 176).

The defendants in error subsequently moved "to quash said writ of error" because it sought "to review proceedings in the Circuit Court done in exact accordance with the mandate of this (Territorial Supreme) Court," and because "the judgment of this (Territorial Supreme) Court rendered May 5, 1909, and the opinion of the court thereon filed April 12, 1909, is the law of this case, binding upon the plaintiff and decisive of the questions herein". (R., 177).

This motion having been argued by counsel for the respective parties (R., 180-182) was, upon consideration by the court denied (R., 766) and the main case having been submitted upon briefs, the judgment of the Circuit Court for the First Judicial Circuit was affirmed "in all things and respects" * * * notwithstanding the said matters and things therein assigned for error." (R., 767).

The opinion of the Territorial Supreme Court on overruling the motion to quash said writ of error and affirming said judgment, is as follows:

Opinion of the Court by Perry, J.:

This case was before us in April, 1909, on a bill of exceptions brought by the defendants. 19 Haw. 398. A full statement of the case will be found in our former opinion. The conclusion of that opinion and the order there contained was, "the exception to the overruling of defendants' motion for judgment non obstante veredicto in so far as it is based upon their discharge from liability by the plaintiff's amendments of value is sustained. The remaining grounds of the motion and the remaining exceptions not necessarily involved are not passed upon." A petition for rehearing was filed and denied. Pursuing the ordinary practice, a communication was thereupon sent by the clerk to the court appealed from, notifying that tribunal of the conclusion thus reached by this court but containing no express order as to future proceedings. Subsequently the Circuit Court entered judgment for the defendants non obstante veredicto and for \$1097.22 statutory attorneys'

fees and costs. Plaintiff thereupon took out a writ of error from this court assigning as error the entry of the judgment non obstante. Defendants move to dismiss this writ on the grounds (a) that the record upon the writ does not present the record upon which the former decision of this court was based but only parts of the same, and (b) that the writ brings up no proceedings subsequent to the former decision of this court other than those had in exact accordance with such decision.

After the filing of the motion to dismiss plaintiff moved for a writ of certiorari commanding the lower court to certify to this court as a part of the record upon the writ of error the former bill of exceptions and certain other documents the omission of which is referred to as one of the grounds of the motion to dismiss. Some of these documents had been returned to the Circuit Court from this court after the former decision and others are still in this court. The statute, R. L. Sec. 1873, itself makes the bill of exceptions and the other documents a part of the record on this writ of error and it is in the interest of a correct determination of the cause in the Supreme Court of the United States, even if not necessary on this writ in this court, that the record should be complete. It was therefore ordered upon the presentation of the motion for the writ of certiorari that all documents in the case still in this court be transferred to and made a part of the record upon this writ and that the Circuit Court be directed to certify the remaining documents.

As to the motion to dismiss. The judgment non obstante was not specifically ordered by this court although it was a necessary result of our former opinion. It was the judgment of the Circuit Court in form and in fact although it was in precise accordance with our views and conclusion, but whether it was entered in accordance with our former opinion is something which cannot be determined without entertaining the present writ and thereunder examining the record brought up by it of the proceedings had in the lower court. It is a contradiction in terms to say that we find that the proceedings had were in compliance with our former conclusion and at the same time to say that the party is not entitled to the writ and that the latter must be dis-

missed. A dismissal is something which happens in limine and without a consideration of the merits. Even those courts which hold that a dismissal is the proper course rather than an affirmance of the judgment below entertain jurisdiction under the writ and reverse the action taken below if they find that it was not in accordance with the former mandate. See, for example, *Stewart v. Salamon*, 97 U. S. 361, 362; *Railroad v. Anderson*, 149 U. S. 237, 242; *Cook v. Burnley*, 111 Wall. 672, 674; *Browder v. M'Arthur*, 7 Wheat. 58; *Roberts v. Cooper*, 20 How. 467, 481; *Supervisors v. Kennicott*, 94 U. S. 498, 499; *The "Lady Pike,"* 96 U. S. 461, 462. The correct procedure, on reason, would seem to be to entertain jurisdiction and either affirm or reverse the judgment were appealed from. What questions are open to reexamination on such a writ is another matter. The mere fact, if such be the course adopted, that upon such a writ no reexamination is had upon issues arising prior to the entry of judgment and disposed of on a first appeal will effectively discourage an abuse of process in the taking of second and third appeals.

That this is the better rule appears even more clearly when we consider the class of cases where the circumstances are as they are in the case at bar.

By the act of March 3, 1905 (33 Stat. at Large, p. 1035), it was enacted that "writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States *in all cases* where the amount involved, exclusive of costs, exceeds the sum or value of \$5000." Congress clearly contemplated that appeals should lie *in all cases*, within the prescribed monetary limit, in which by a decision final in Hawaii the Supreme Court of Hawaii should determine the law, or in which, being within its jurisdiction, it should be asked to so determine the law. A decision by this court, such as was rendered in the case at bar, upon questions arising under a bill of exceptions is not final and appealable within the meaning of the act of 1905. This has been definitely determined by the Supreme Court of the United States. *Cotton v. Hawaii*, 211 U. S. 162, 170, 174, 175; *Hutchins v. Bierce*, 211 U. S. 429; *Spreckels v. Brown*, 212

U. S. 208. It cannot be said in this case that the plaintiff has waived its right to place itself in a position to enable it to appeal to the Supreme Court of the United States, for the former bill of exceptions was not brought by it but by its opponent. The plaintiff at that time was not aggrieved. The judgment of the lower court stood in its favor. It was aggrieved by our decision on the exceptions but had no right of appeal therefrom. Now for the first time the judgment of the Circuit Court stands against it. To hold that a writ of error lies to review the judgment non obstante, however narrow the reviewable issues may be in *this* court, is to further the intent of Congress as expressed in the act of 1905, while to hold the opposite is to nullify the provisions of that act and to deprive parties of the right to a review in the Supreme Court of the United States in a large class of cases, without any waiver and purely in consequence of the act of an opponent in choosing his method of review in the Supreme Court of Hawaii. At best it is a choice in a matter of mere procedure. That method is to be preferred which carries into effect the act of Congress. While it is true that this court should neither acceleratae nor retard appeals from its decisions, it should nevertheless so act as not to deprive parties by its own act or permit them to be deprived by the act of an opponent of a right of appeal secured to them by congressional legislation.

It is true that in a number of cases the Supreme Court of the United States has adopted the procedure of dismissing second appeals and writs when they are simply taken from judgments and decrees entered in conformity with an earlier mandate of the appellate court, and other courts likewise have so held. In none of those cases, however, was the first adjudication by a court of intermediate appeal and non-appealable to a court of last resort and therein lies an important distinction and one which requires the adoption of a rule contrary to that followed by the Supreme Court of the United States. But even in the latter tribunal instances are not wanting where the judgment appealed from has been affirmed and the appeal or writ not dismissed. See, for example, *Supervisors v. Kennicott*, *supra*; *The "Lady Pike"*, *supra*; *Washington v. Stewart*, 3 How. 413, 425, 426.

See also *Lathrop v. Knapp*, 37 Wis. 307; *Fire Department v. Tuttle*, 50 Wis. 552.

Again, our statute on writs of error, R. L. Sec. 1869, contemplates that writs shall be allowed to any and all judgments of the Circuit Court, and while in this instance that court may have felt under compulsion to enter a judgment non obstante the latter was, nevertheless, its judgment. The plaintiff is entitled, as of right, to the issuance of the writ.

In *Kealoha v. Castle*, 17 Haw. 415, on a writ of error raising no questions other than those already decided upon reserved questions this court affirmed the decree appealed from, and the Supreme Court of the United States, affirming on the merits our decree, said nothing by way of disapproval of the practice. In *Notley v. Brown*, 17 Haw. 455, relied upon by the defendants, the case first came to this court on a bill of exceptions. The exceptions were overruled. Subsequently the same appellant brought a writ of error, in the same case, assigning as error the same matters decided on the exceptions and also certain proceedings had in the trial court after the remaining order and in conformity with it. The writ was dismissed. The majority is of the opinion that that case is distinguishable from this in that there the same party attempted to review the same questions a second time in the same case, in substantial conflict with the rule of election laid down in *Ferrira v. Rapid Transit Co.*, 16 Haw. 406, while here plaintiff for the first time is attempting to have reviewed a certain question which the statute gives him a right to do and which cannot be denied by this court.

As to how far, if at all, an appellate court is at liberty on a second appeal from a judgment entered in pursuance of its mandate on a first appeal to re-examine on the merits the questions already considered and decided courts are divided. The great majority, including the Supreme Court of the United States, take the view that a second appeal or writ brings up for review only the proceedings had in the lower court subsequent to the earlier mandate of the appellate court, and that on such appeal no re-examination may be had of matters occurring prior to the entry of such decree. The law as declared upon the first appeal is said to be "the law

of the case" binding upon the appellate court which declared it as well as upon the inferior court. This view is based, sometimes upon the consideration *ut sit finis litium* the argument being that if parties are to be permitted to take out appeals to secure a review of law once decided there never can be a certain end to the litigation, and sometimes on the theory that it is not within the power of the appellate tribunal to review its own decisions even though it be within its power to review the decisions of lower tribunals,—that the law creating the appellate court gives it the power last mentioned but not the first. Sometimes, again, it is based on the doctrine of *res judicata*. These reasons appear to other courts not to be entirely satisfactory. It is well, indeed, say the latter, that there should be an end to litigation, but far better that occasionally that end be somewhat delayed than that a manifest error should be perpetuated. Concerning the alleged lack of power, it is similarly said that the real question which arises on the second writ is, "Is the judgment appealed from correct in law?" and the correct view that, if it is not, the appellate court, still considering the same case, still having before it the same parties and no final adjudication or execution having yet been rendered or issued, has the power to correct its error. Continuing, the weakness of the attempt to regard the former ruling as *res judicata* is said to lie in the fact that it is not a final judgment and that it is elementary that that doctrine is always predicated upon final judgments between the parties. On the other hand it can be said, in favor of the majority rule, that nothing substantial can be gained in the securing of right and justice by permitting a second or a third reopening of an argument instead of regarding the matter as closed after the first opinion with the usual right to a rehearing under the rules of court,—that it is as human to err on a second appeal as it is to err on a first appeal.

A minority of the state courts take the view that, while ordinarily an opinion once declared concerning the law should be thereafter adhered to by the appellate as well as other tribunals, still the rule is not an inflexible one and may be departed from where the prior opinion is manifestly erroneous. *Hastings v. Foxworthy*, 34 L. R.

A. 321 (Neb.) contains the best considered opinion to this effect. The other states adopting this view are Missouri, Utah and Texas and, in some of their decisions, Connecticut, New York, and Ohio. Which is the better doctrine need not, in the opinion of the majority, be determined in this case, the minority being of the opinion that the power of re-examination exists and that the point is necessarily involved. If the question decided on the bill of exceptions is not now open for re-examination, the judgment below must be affirmed. If, on the other hand, it is within our power to re-examine, the same result is reached. The matter was on the first appeal very carefully considered, after able and exhaustive presentation by counsel. No new argument on the merits is now advanced. It is not contended that any controlling decisions or principles were overlooked. The court is simply asked to study the issue anew, on practically the same briefs (no oral argument is presented) and to endeavor to come to the opposite conclusion. The only substantial hope of a reversal lies in the fact that since the former opinion was rendered, the personnel of the court has changed. This of itself is not sufficient to justify a re-examination. That degree of certainty which is desirable in the law forbids that a matter once adjudicated be reopened for such a reason as this.

The motion to dismiss the writ is denied and the judgment non obstante is affirmed."

It is to review the final judgment of the Territorial Supreme Court, entered in this case on the 23d day of November, A. D. 1909 (R., 767), pursuant to the above-quoted opinion of the court, delivered by Perry, J., on the 6th day of November, A. D. 1909, that the writ of error in this case has been sued out and perfected.

The amount involved is in excess of \$5,000.00 and prior to the allowance of said writ of error by the Chief Justice of the Supreme Court of the Territory of Hawaii (R., 769) the plaintiff in error had duly filed in that court its assignment of errors relied upon to secure a reversal of the judgment (R., 769-771).

Although the assignments of errors filed are nine (9) in number they are all reducible to the single proposition that the Supreme Court of the Territory of Hawaii erred in affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, vacating and setting aside the judgment of said Circuit Court entered in said cause on the 29th day of May, A. D. 1908, on the verdict of the jury found in favor of the plaintiff, William W. Bierce, Limited, and against the defendants, and entering judgment notwithstanding said verdict in favor of the defendants, William Waterhouse and Albert Waterhouse, executors, etc., of Henry Waterhouse, deceased, and against said plaintiff, for the sum of \$1,097.22, costs.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States to review the final judgments of territorial courts is found in the act of Congress approved April 7, 1874, entitled "An Act Concerning the Practice in Territorial Courts and Appeals Therefrom" (18 Stats. L., 27, chap. 80), the second section of which declares:

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal." * * *

See *Apache vs. Barth*, 177 U. S., 538, 541.
Armijo vs. Armijo, 181 U. S., 558, 561.

The act of Congress of April 30, 1900 (31 Stats. L., 141, chap. 339), entitled "An Act to Provide a Government for the Territory of Hawaii," provides, among other things:

"SEC. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may

from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided." * * *

"SEC. 86. * * * The Laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." * * *

The act of March 3, 1905, entitled "An Act to Amend Sections 56, 80, and 86 of 'An Act to Provide a Government for the Territory of Hawaii,' approved April 30, 1900" (33 Stats. L., 1035), provides:

"SEC. 3. That section eighty-six of the aforesaid act be amended by adding the following at the end of said section: '*Provided*, That writs of error and appeals may also be taken from the supreme court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars.'"

"SEC. 4. That this act shall take effect and be in force from and after its passage."

The act of March 3, 1909, entitled "An Act to Amend Section Eighty-six of An Act to Provide a Government for the Territory of Hawaii, to Provide for Additional Judges, and for Other Judicial Purposes" (35 Stats. L., 838), provides:

"That section eighty-six of the act approved April thirtieth, nineteen hundred, entitled 'An Act to provide a government for the Territory of Hawaii,' be, and the same is hereby, amended so as to read as follows:

"SEC. 86. * * * The laws of the United States relating to appeals and writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. * * * *Provided*, That writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars."

By these amendatory acts the jurisdiction of this court has been extended to embrace all cases, irrespective of the nature of the questions presented, "where the amount involved, exclusive of costs, exceeds the sum or value of \$5,000.00."

Bierce vs. Hutchins, 205 U. S., 340, 344.

Cotton vs. Hawaii, 211 U. S., 162, 169.

In the case at bar the trial was to a court and jury. The judgment of the circuit court on the remittitur from the Supreme Court of the Territory of Hawaii in favor of the defendant, *non obstante veredicto*, was entered May 29, 1909 (R., 126) and exception thereto was filed by plaintiff and allowed the same day (R., 127). Plaintiff's bill of exceptions taken on the entry of said judgment was approved and filed June 28, 1909, and a writ of error removing "the records, proceedings, and judgment in the original cause, from the Circuit Court of the First Judicial Circuit of the Territory of Hawaii to the Supreme Court of the Territory of Hawaii, was issued June 29, A. D. 1909 (R., 3). November 6, 1909, the Supreme Court of the Territory handed down a written opinion, concluding, to-wit: The motion to dismiss the writ of error is denied and the judgment *non obstante* is affirmed (R., 766), and on the 23d of November, 1909, said Supreme Court entered formal judgment affirming the judgment *non obstante veredicto* entered May

29, 1909, "in all things and respects, * * * notwithstanding the said matters and things therein assigned for error" (R., 767).

To review this final judgment of the Supreme Court of the Territory the writ of error from this Court, dated December 21, 1909, was allowed (R., 773), and duly perfected.

The amount in dispute, exclusive of costs, greatly exceeds \$5,000.00.

Assignment of Errors.

The Supreme Court of the Territory of Hawaii erred in sustaining the exception of defendants William and Albert Waterhouse, executors under the will and of the estate of Henry Waterhouse, deceased, to the action of the circuit court in overruling said defendants' motion for judgment *non obstante veredicto*.

The Supreme Court of the Territory of Hawaii erred in affirming the judgment of May 29, 1909, of the circuit court for the first judicial district of Hawaii vacating and setting aside its prior judgment of May 29, 1908, entered on the verdict of the jury in favor of plaintiff and against said defendants, and adjudging and ordering that notwithstanding said verdict of the jury the plaintiff should take nothing by its writ, and that said defendants should recover of and from said plaintiff their costs, taxed at the sum of one thousand, ninety-seven and 22/100 (\$1,097.22) dollars.

Merits.

The propriety of the practice of the courts of the Territory of Hawaii, exemplified in this case, of entering judgment *non obstante veredicto* on motion of the defendant,

was not questioned below and, in any event, probably would not be reviewable by this Court.

Matters of practice in territorial courts are based upon local statutes and local rules or methods of procedure. This court is not disposed to review the course of action or the decisions of the Territorial Supreme Courts in such matters.

Armijo vs. Armijo, 181 U. S., 558, 561.

Ankeny vs. Clark, 148 U. S., 345, 354-355.

Sweeney vs. Lomme, 22 Wallace, 208.

The "decision" of the Supreme Court of the Territory of Hawaii, dated May 5, 1909, sustaining defendants' exception to the action of the trial court in overruling their motion "for judgment *non obstante veredicto* in so far as it is based upon the discharge from liability by plaintiff's amendments of value," did not constitute a final judgment and was not subject to review by this Court.

Cotton vs. Hawaii, 211 U. S., 152.

Hutchins vs. Bierce, Ltd., 211 U. S., 429.

It is otherwise with respect to the "judgment" of said Supreme Court affirming "in all respects" the judgment of the circuit court dated May 29, 1909. Viewed in any aspect and tested by every rule of decision, the judgment of the Supreme Court of the Territory, dated November 23, 1909, is "final" and is subject to review in this Court.

On writ of error from this Court to review said final judgment of November 23, 1909, the action of the territorial supreme court in making and entering said "decision," as well as its action in entering said final judgment, may be reviewed, and if error be found in either action it may be corrected here.

United States vs. Denver & R. G. R. R. Co., 191 U. S., 84, 93.

Mendenhall vs. Hall, 134 U. S., 559.

But this Court cannot review any action of the trial court involved in "exceptions" or even on appeal to the supreme court of a territory, the propriety of which action was not passed upon by the Territorial Supreme Court.

San Pedro, &c., Co. *vs.* United States, 146 U. S., 120.

The inquiry of this Court is limited to the rulings of the Supreme Court of the Territory; it is its judgment, not that of the trial court, which is under review.

And it is equally well settled that the necessary effect of the provisions of section 2 of the act of April 7, 1874, chapter 80, *ubi supra*,

"is that no judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law."

Idaho, &c., Land Imp. Co. *vs.* Bradbury, 132 U. S., 509.

As observed by Mr. Chief Justice Waite, delivering the opinion of the Court in *Hecht vs. Boughton*, 105 U. S., 235, 236:

"We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions or questions of law otherwise presented by the record, and upon an appeal to the statement of facts and rulings certified by the court below."

In either class of cases, whether equitable or legal, coming to this court from a territorial supreme court after a hearing or trial on facts, the evidence at large ought not to be brought up. The authority of this court in all such cases is limited to determining whether the lower court's findings of fact, if any there be, support its judgment or decree, and to whether there is any error in rulings duly excepted to in the admission or rejection of testimony, which exceptions have been properly preserved of record. This court is with-

out authority to consider the weight of evidence or its sufficiency to support conclusions of the territorial courts.

Apache County *vs.* Barth, 177 U. S., 538.

Harrison *vs.* Perea, 168 U. S., 311.

Bear Lake, &c., Waterworks Co. *vs.* Garland, 164 U. S., 1.

Haws *vs.* Victoria Copper Mining Co., 160 U. S., 303.

San Pedro, &c., Co. *vs.* United States, 146 U. S., 130.

Stringfellow *vs.* Cain, 99 U. S., 610.

Even in cases brought up by appeal where the record presents no statement of facts to enable this court to determine whether the facts found, or supposed to have been found, are sufficient to sustain the judgment, and no exceptions taken to rulings in the admission or rejection of evidence have been properly preserved of record, and properly brought before this court, there is nothing for this court to review.

Salina Stock Co. *vs.* Salina Irrigation Creek Co., 163 U. S., 109.

"We are not at liberty," said Mr. Justice Matthews, speaking for the Court in *Neslin vs. Wells*, 104 U. S., 429, "to consider anything as embraced in the statement of facts required by the statute, except the special findings of the district court adopted by the Supreme Court in its general judgment of affirmance. This excludes the consideration of exceptions taken in the district court in the course of the trial and noted in the statement filed in that court as the basis of the motion for a new trial, and leaves, as the sole question for determination here, whether the facts as found justify the decree sought to be reversed."

The voluminous transcript of record in this case may be divided, without difficulty, into two distinct parts, the one consisting of pages 1 to 182 and pages 743 to 788, all included, wherein will be found the record proper on the writ

of error now before this Court. The other, consisting of pages 185 to 743, inclusive, contains the bill of exceptions of the defendants, William and Albert Waterhouse, executors, etc., together with the entire transcript of the evidence and various exhibits and other matters made part of said bill of exceptions by reference. That bill of exceptions was brought to review in the Supreme Court of the Territory certain exceptions specified therein to the action of the circuit or trial court in the course of the trial which led up to the entry in that court of the judgment of May 29, 1908, on the verdict of the jury in favor of the plaintiff, William W. Bierce, Limited. As these exceptions only presented for review to the Supreme Court of the Territory particular rulings of the trial court, and did not purport to present to the former court the whole record in the cause, the order or "decision" entered by the Supreme Court sustaining the exception to the overruling of defendants' motion for judgment *non obstante veredicto*, in so far as it is based upon the discharge from liability by plaintiff's amendments of value (R., 125), was in no sense a final judgment and consequently was not open to review here (*Cotton vs. Hawaii*, 211 U. S., 162). Except in so far as said bill or portions thereof have been preserved by the bill of exceptions on the present writ of error (see bottom of record, page 113 and top of 114), it should not be looked to or consulted by this Court.

Said bill of exceptions and accompanying exhibits were properly a part of the record in the Supreme Court of the Territory (see section 1873, Revised Laws of Hawaii, 1905; *Meheula vs. Pioneer Mill Co.*, 17 Hawaii, 91); but except as preserved in small part in the bill of exceptions on the writ of error from this Court, as next above noted, it can form no part of the record here.

Neslin vs. Wells, 104 U. S., 429.

Assuming for the purposes of argument that all the matters of law raised or reserved in or by defendants'

"motion for judgment *non obstante veredicto*" are open for consideration by this Court on the present writ of error, we nevertheless think it orderly to first consider that particular ground of said motion, viz., ground No. 7, which alone was made the basis of the "decision" of the Supreme Court of the Territory, in obedience to which decision the trial court acted in setting aside its judgment in favor of plaintiff in error here entered on the verdict of the jury, and subsequently entering judgment for defendants in error *non obstante veredicto*.

The Supreme Court of the Territory of Hawaii erred in ruling that the sureties on the bond sued on were discharged from liability by the amendments of the averments of the complaint in the replevin suit, whereby the alleged value of the property in question was increased from \$15,000 to \$22,000. The amendments were properly made during the course of the trial by leave of court, in order to make the pleadings correspond with the proofs, and the *ad damnum* as increased was within the penalty of the bond. No new cause of action was introduced by the amendments, and the liability of the sureties was not thereby increased.

The statute of Hawaii under which the amendments in question were made is substantially the same as that found in most of the States. It is as follows:

"SECTION 1145. Whenever a plaintiff in an action shall have mistaken the form of action suited to his claim, the court or judge, on motion, shall permit amendments to be made on such terms as it shall adjudge reasonable; and the court or judge may, in furtherance of justice, and on the like terms, at the trial or on appeal, or at any other stage before or after judgment, allow any petition or pleading or process or proceeding to be amended by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations ma-

terial to the case, or, when the amendment does not substantially change the claim or defense, by conforming the pleadings or the proceeding to the facts proved."

Session Laws of Hawaii (1903), 366.

Revised Laws of Hawaii (1905), § 1738.

On the appeal of the defendant, Clinton J. Hutchins, trustee, to the Territorial Supreme Court in the replevin suit on bill of exceptions, he excepted to the action of the trial court in allowing the plaintiff to make the amendments in question; but the Supreme Court overruled his exception, saying:

"The only exceptions to rulings prior to the judgment on which the defendant relies in argument are (1) to allowing the plaintiff to amend its complaint by changing the averment of the value of the property, first from \$15,000 to \$20,000, and then to \$22,000. * * *

"The amendments were properly allowed under the statute (Sec. 1738, R. L.). Before the property was delivered to the plaintiff the defendant obtained a return of it to himself upon his statutory bond in double the value of the property as originally stated by the plaintiff. It does not appear that the defendant's rights were affected by the amendment increasing the value." * * *

Bierce *vs.* Hutchins, 18 Haw., 511, 522.

For reasons stated in a subsequent part of this argument it would seem that the sureties on the redelivery bond, as well as Clinton J. Hutchins, trustee, their principal, with whom they were in privity, and who represented them in the replevin suit, were concluded by this adjudication respecting the propriety of the amendments in question.

As a general rule, amendments to the complaint or declaration may be made in actions of replevin, when authorized by statute, and the *ad damnum* increased, without affecting

the liability of the sureties on the replevin bond or redelivery bond, so long as no new cause of action is introduced by the amendment whereby the liability of the surety would be increased beyond the amount of the penalty named in the bond.

It is so held in Massachusetts, Michigan, Wisconsin, Pennsylvania, Indiana, Vermont, Ohio, and other States.

The application of the rule is well illustrated in the early Massachusetts case of *Wood vs. Denny*, 7 Gray, 540. Two writs of *scire facias* against bail were tried together before the chief justice. In one case, the original declaration consisted of the money counts *in assumpsit*. Later the declaration had been amended by filing new counts declaring specially on certain promissory notes. The court ruled that no new cause of action was introduced by the additional counts, and that the bail was not thereby discharged. In the opinion of the court it is said:

"The notes declared on in the new counts, when given in evidence, would have supported the money counts. The amendment therefore did not affect the liability of the bail or of the principal. The judgment was for the same cause of action, and for the same amount that it would have been if no amendment had been made. *Brooks vs. Clark*, 2 D. & R., 148."

In the other case there had been added by amendment to the money counts a new count on a guaranty of a debt due from a third person to the plaintiff which the court held was not for the same cause of action as the money counts, and could not have been given in evidence under those counts.

In its opinion the court said:

"As to the bail, we are of opinion that it discharged him from his undertaking. He became bail in an action for money had and received, money

lent and money paid, as set forth in the writ and declaration against the principal, and not in an action on a guaranty by the principal of the plaintiff's claim on another.

"The rule by which the court is to decide whether an amendment discharges bail or dissolves an attachment so as to let in subsequently attaching creditors is correctly stated by Mr. Justice Wilde as follows: Amendments in form merely will not dissolve an attachment or discharge bail. To have this effect the amendment must be such as to let in some new demand or new cause of action.' *Haven vs. Snow*, 14 Pick., 33, 34. *Wight vs. Hale*, 2 Cush., 493. See also *Hayes vs. Morgan*, 3 Mass., 210. In the case before us, the amendment did let in a new cause of action which was not known, even by the attorney until after the writ, declaration and arrest were made."

Townsend National Bank vs. Jones, 151 Massachusetts, 454, was an action against the sureties on a bond given to release attached property. The defendants claimed to be released on the ground that after the execution of the bond, and without notice to them, the plaintiff in the attachment suit had been permitted to amend his declaration. In the original declaration there was only one count declaring on a draft, but attached to the declaration were copies of four drafts. In the amended declaration the plaintiff declared in a separate count on each of the drafts, and annexed copies thereto as exhibits. The *ad damnum* in the original declaration and writ of attachment was \$7,000; but before the execution of the bond, by consent of the defendant this amount was reduced to \$6,000. Subsequently, on motion and without notice, the *ad-damnum* in the original declaration was increased by amendment to the original amount, \$7,000. The trial judge ruled that as a matter of law the effect of the amendment of the writ and declaration was to release the surety from liability and render a judgment for the defendant. The Supreme Court, in reversing this judg-

ment for error, quoted the statute relative to the amendment of pleadings, and, in part, said:

"While the adjudication is conclusive on the principal, as the large power of amendment conferred on the court was known to the defendant who, in the case at bar, is a surety, he has no ground of complaint, nor is he discharged from his obligation if the amendment only describes the same causes of action—technically and accurately—which were imperfectly described in the declaration; but of which he had notice when he became a surety on the bond to dissolve the attachment on the plaintiff's goods. The surety cannot take advantage of formal defects made by the plaintiff in stating his case. Unless the effect of the amendment would be to impose on him a greater liability than he had originally assumed by letting in a new cause of action, he is not released because of its allowance. *Fairfield vs. Baldwin*, 12 Pick., 388. *Wood vs. Denny*, 7 Gray, 540. *Ball vs. Clafln*, 5 Pick., 303, 305. *Haven vs. Snow*, 14 Pick., 28, 33. *Lord vs. Clark*, 14 Pick., 223. *Kellogg vs. Kimball*, 142 Mass., 124. *Doran vs. Cohen*, 147 Mass., 342. *Lanahan vs. Porter*, 148 Mass., 596.
* * *

"Nor is the surety discharged by a mere change in the *ad damnum* named in the writ. The liability of the surety is for the penal sum in the bond, with interest. In fixing a penal sum in the bond to dissolve an attachment, he has limited his liability to that amount. So long as no new cause of action has been introduced, his rights have not been affected. He has consented to become responsible, to the amount of the penal sum in his bond, for which the plaintiff may recover upon the cause of action on which his writ was brought, however the same might have been described. No recovery of a larger sum thereon can affect this liability. If a different and additional cause of action had been introduced into the plaintiff's writ, whether the *ad damnum* had been increased or not, the defendant would have ground of objection, unless it could be clearly shown that the plaintiff had recovered only on the original

cause of action. The liability of the surety is similar to the liability of bail, and where this liability is not increased the increase of the *ad damnum* does not discharge the bail."

It would seem that a more authoritative precedent than the decision last cited could not be adduced in support of any proposition of law. It is to be noted that the opinion of the court consistently reviews and follows numerous former decisions of the same court, every one of which is found, upon examination, to state or reiterate the rule that a surety is not discharged by an amendment which merely increases the *ad damnum* to an amount within the penalty of the bond and introduces no new cause of action. We think the Massachusetts cases merit particular attention, for the reason indicated; especially in view of the seeming attempt in the majority opinion of the Territorial Supreme Court on exceptions to distinguish *Townsend National Bank vs. Jones, supra*, from the case at bar (Rec., 120).

Thus, it is said: "In Massachusetts a statute (Pub. Sts., ch. 167, sec. 42) is construed as binding sureties in the event of amendments, provided it appears that the amended cause of action is the same as that relied on by the plaintiff when the action was commenced, however the same may be misdescribed" (Rec., 120).

And again it is said: "The issue under this statute is, therefore, merely whether a new cause of action has been introduced and decisions upon one side or the other * * * are not helpful."

We find in the statute in question (quoted below) nothing directly or indirectly relating to the subject of binding sureties; nor do we find anything in the decisions of the Supreme Court of Massachusetts, above cited, which suggests that the court construes the statute as binding sureties. Sureties, under such circumstances, and in such cases, are obviously bound by virtue of their contracts, and not by

reason of such legislative acts as the Massachusetts statute in question, which is as follows:

"SECT. 42. At any time before final judgment in a civil suit amendments may be allowed, on such terms as are just and reasonable, introducing a party necessary to be joined as plaintiff or defendant, discontinuing as to joint plaintiff or defendant, changing the form of the action, and in any other matter, either of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or the defendant to make a legal defense."

The rule of the Massachusetts cases is buttressed by leading case of *Jamieson vs. Capron*, 95 Penn. St., 15, which involved an action against the surety on two property (re-delivery) bonds given in two actions of replevin brought in the names of Henry P. Duncan, Samuel Duncan, and Stephen Duncan, executors of Stephen Duncan, deceased.

After the cases were at issue, on motions of the plaintiffs, the record in each case was amended by order of court, by striking out the words "executors of the last will and testament," and by substituting the words "heirs at law," and by adding the names of other heirs at law as plaintiffs.

The three plaintiffs who originally sued were, in fact, heirs-at-law of Stephen Duncan, deceased, and the mistake made in bringing the suit, which was corrected by the amendment appears to have been made in styling them as executors, instead of heirs. The court said:

"There was no change in the cause of action. The basis of the claim, before as well as after the amendment, appears to have been title derived from Stephen Duncan, deceased. The parties brought upon the record were not strangers as to the claim. They were joint heirs with the original parties, and all derived

title to the property in controversy from a common source.

"It follows, therefore, that the defendant had no available defense, either on the ground that the amendment was unauthorized or that it introduced a new cause of action. * * *

"When a person becomes surety for another in a judicial proceeding there is an implied understanding that it shall be conducted according to the provisions of law relating thereto. The statutes regulating amendments, as well as other incidents of trial, are as much a part of the contract in the contemplation of the parties thereto as if they were embodied in the condition of the bond. There is, and necessarily must be, this distinction between contracts of suretyship in ordinary business affairs and those connected with judicial proceedings. * * * So, in the present case, the plaintiff in error, in becoming surety for the defendants in the actions of replevin, must be considered as having contracted with reference to the law applicable to the trial and final determination of the cases, and with the view of becoming responsible for the amount that might ultimately be adjudged against the defendant."

In *Hare vs. Marsh*, 61 Wisconsin, 435, a bond was given to stay execution on a judgment for \$25 damages, and costs, rendered by a justice of the peace, pending an appeal from the judgment to the circuit court. The appeal bond was conditioned for the payment of the amount remaining unsatisfied if judgment be rendered against the appellant and execution thereon returned unsatisfied in whole or in part.

The circuit court granted plaintiff leave to amend the *ad damnum* clause in his complaint so as to claim \$2,000 damages instead of \$200; the latter being the limit of the jurisdiction of the justice.

The Supreme Court held that the surety was not released by the making of such amendment, saying:

"Of course the action was triable in that court, the same 'as actions originally brought there.' (Sec. 3768, R. S.) Hence the pleadings were open to amendment in that court, the same as if the action had been originally brought there. The amendment here did not add any new cause of action, but simply authorized a larger recovery upon the same cause of action. * * * Having, by signing the undertaking, made himself liable for any judgment the plaintiff might recover in the circuit court, the surety cannot be released by the unexpected exercise of the proper and authorized judicial powers of that court. The undertaking presupposes the exercise of such authorized judicial powers as should be called into action in the case. The contract was impliedly, if not expressly, with reference to such exercise of judicial power. The judgment was conclusive against the surety under our statute. (*Masser vs. Strickland*, 7 Am. Dec., 668.) We must, therefore, under the provisions of our statute and the cases cited, hold that the surety as not released by reason of the increase of the amount claimed in the *ad damnum* clause of the complaint."

In an early Michigan case, *Evers vs. Sager*, 28 Michigan, 48, 52, it was held that the increase of the *ad damnum* beyond the jurisdiction of the justice of the peace, while unauthorized by statute, was cured by the stipulation of the defendant. In the opinion of the court, by Mr. Justice Cooley, it is in part said:

"If the court had possessed the power to order or allow such an amendment, irrespective of the stipulations of the parties, the sureties would have been bound by its actions, because their obligation would be understood as contemplating a possible exercise of such power."

Merrick vs. Greely, 10 Missouri, 106, was an action brought for materials furnished in a proceeding against a boat. In the original complaint it was averred that the ma-

terials were furnished on account of A. Asburn, who was described as "a part owner and husband of said boat." At a subsequent trial leave was obtained to amend the complaint by striking out the words descriptive of the person at whose instance the materials were furnished, and inserting in lieu thereof "agent of the owners of said boat."

There was a verdict and judgment against the boat, and judgment was also entered against the sureties, who, however, contended that they were discharged from liability on account of the amendment. The court said:

"We do not see how the amendment affected the securities. No new cause of action was introduced by it. * * * Liability to the plaintiffs was not in anywise varied by it. * * * The principles on which amendments in cases like the present are allowed are clearly stated in the cases of *Seely vs. Brown*, 14 Pick., 177, and *Ball vs. Claffin*, 5 Pick., 303. These cases maintain that when no new cause of action is introduced by an amendment, and the liability of bail is not affected by it, it is always allowable."

In *Hanna vs. International Petroleum Company*, 23 Ohio St., 622, which was an action on a replevin bond, the sureties claimed exemption from liability on the ground that in the replevin suit the record was amended by the substitution of the International Petroleum Company as the defendant, in place of its agent, Edson, in whose possession was the property in question sought to be replevied. The court, in denying the contention of the sureties that they were discharged from liability, say:

"We think that the substitution of the company as defendant, in place of its agent, Edson, did not release the sureties in the undertaking. By the terms of that instrument the sureties undertook that the plaintiff should duly prosecute 'his action aforesaid' and pay 'all costs and damages' awarded against him. The costs and damages here sought to be recovered

were awarded 'against him,' and they were awarded against him in the 'same action.' It was a proper case for the change of parties; the change worked no prejudice to the rights of Pelletier."

To the same effect are *New Haven Bank vs. Miles*, 5 Connecticut, 587.

Carr vs. Sterling, 114 New York, 558.

The sureties on the redelivery bond were represented in the replevin suit by the defendant, Clinton J. Hutchins, trustee, and were identified with him in interest and claimed in privity with him so as to be concluded by the proceedings and judgment in that suit.

It should be borne in mind that when the deceased surety, Henry Waterhouse, first entered into contractual relations with the plaintiff, the latter had just brought a replevin suit for the recovery of possession of the goods in question, had given a replevin bond in the penal sum of \$30,000 conditioned according to law, and had caused the high sheriff to seize the goods in question. The property had been levied upon by the sheriff and was in his possession, and thereby the plaintiff's rights were made secure. Under these circumstances the sureties, Henry Waterhouse and Arthur B. Wood, came forward and voluntarily gave to the sheriff the redelivery bond, conditioned for the delivery of the property, to William W. Bierce, Limited, if such delivery should be adjudged and for the payment of such sum of money as might, for any cause, be recovered against the defendant. They intermeddled in the pending litigation. They were not brought in, or invited in, but came into it voluntarily and by executing the redelivery bond in question caused the property to be returned to the defendant, thereby depriving the plaintiff of the property to which it was subsequently adjudged to be entitled.

In thus becoming sureties for the defendant, in the re-

plevin action, the defendants must be considered as having contracted with reference to the law applicable to the trial and final determination of such suits, including the statute of Hawaii, authorizing amendments such as are in question, and with the view of becoming responsible for the amount that might be ultimately adjudged against the defendant in the replevin proceedings. This is the effect of all the authorities, and infallibly leads to the doctrine, which is equally well settled, that in an action on a replevin or redelivery bond, the judgment in the replevin suit is conclusive upon the sureties on the bond. The sureties being identified in interest with the principal, are regarded as having been represented by him in the course of the replevin case, and they, having contracted with reference to the judgment therein, are held, in the absence of fraud, to be concluded by all proceedings had, down to and including such judgment.

Thus, it is said:

"The surety on a bond given in the course of legal proceedings submits himself to the acts of the principal, and to the judgment, as itself a legal consequence, falling within the suretyship, and therefore is conclusively bound by a judgment against the principal, to the exclusion of all defenses which were or might have been set up by the latter."

23 Cyclopædia of Law and Procedure, 1278.

In an action by a surety on a guardian's bond, against his co-surety for contribution, the plaintiff having paid the judgment rendered against the guardian and himself, the defendant offered to prove that the judgment was obtained as a part of a collusive arrangement between the judgment creditor and the guardian to defraud the ward. The defense was rejected, the court saying:

"The general rule, of course, is that a judgment is conclusive only as against parties and privies; but to this there are exceptions. And it is conceded that

whenever the surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts, he is concluded by the judgment."

Shepard *vs.* Pebbles, 38 Wisconsin, 373, 378.

See, also,

Cobbey on Replevin, section 1331.

In Bradford *vs.* Frederick, 101 Penna. St., 445, a suit against the sureties on a redelivery bond given in an action of replevin, the sureties sought to be relieved from liability on the ground that judgment was confessed, without their knowledge, by the defendant in the replevin suit. The court held this to be no defense, saying:

"There is no difference in legal effect between a judgment confessed and a judgment on the verdict of a jury. * * * It was said by our brother, Sterrett, in Jamieson *vs.* Capron, 14 Norris, at page 20, 'The plaintiff in error, in becoming surety for the defendants in the action of replevin, must be considered as having contracted with reference to the law applicable to the trial and final determination of the cases, and with the view of becoming responsible for the amount that might ultimately be adjudged against the defendants.' This language is applicable here. The confession of a judgment by the defendant is a recognized and orderly mode of ending a pending suit."

It will be remembered that in Jamieson *vs.* Capron, 95 Penna. St., 15, above cited, the decision of the court turned upon the fact that "the plaintiff in error, in becoming surety for the defendants in the action of replevin, must be considered as having contracted with reference to the law applicable to the trial and final determination of the cases, and with the view of becoming responsible for the amount that might ultimately be adjudged against the defendants."

To the same effect see *Hocker vs. Wood's Exr.*, 33 Penna. St., 466; *Tracy vs. Maloney*, 105 Mass., 90; *Cutter vs. Evans*, 115 Mass., 27.

In *Knight vs. Dorr*, 19 Pick., 48, 51, the defense was that the bail was discharged by plaintiff's amendment in striking out the name of one of the original defendants; but the court ruled that as the amendment had no effect upon the plaintiff's recovery, it could not absolve the defendants from the obligations of their bail bond. Among other things, it is said in the opinion of the court:

"When the defendants gave their bond they assumed the responsibility of bail, subject to various amendments of the plaintiff's writ and declaration in matters of form and to such modifications of the mode of proceeding as the legislature might think proper to make."

Smith vs. Mosby, 98 Indiana, 445, was an action against the sureties on a replevin bond.

On the trial of the replevin suit, the issues having been determined by the verdict of the jury in favor of the defendant in replevin, the court rendered an alternative judgment awarding the defendant the possession of the goods, and, in the event that they should not be returned, a judgment for their value.

The defendants tried to reopen the question of the value of the goods and have the same determined to be of less value than the amount fixed by the judgment in replevin.

The court said of this defense:

"This answer admits the rendition of the judgment in the action of replevin as averred, and seeks to show that the matters involved in the issues were not in fact adjudicated. This cannot, as we think, be done. The judgment, as between the parties, is conclusive not only as to the ownership of the property, but as to its value. This has been repeatedly decided."

In *Schott vs. Youree*, 142 Illinois, 233, 243, concerning the contention of the defendant that he was discharged from liability as surety on the replevin bond by the action of the court in granting a change of venue in the replevin suit from the Circuit Court of Madison County to the Circuit Court of Jersey County, the court said:

"The surety in the replevin bond (appellant here) contracted with reference to the action of his principals in prosecuting the replevin suit, and he is therefore concluded, as are his principals, by the judgments and orders made in that suit so far as the present question is concerned. *Stevens vs. St. Louis & S. F. Ry. Co.*, 94 Mo., 317; *Riddle vs. Baker*, 13 Cal., 295. See also 12 Am. & Eng. Ency. of Law, p. 98, sec. 15, and cases cited in note 5; *Gradle vs. Kern*, 109 Ill., 557."

In *Kennedy vs. Brown*, 21 Kansas, 171, the condition of the band was "that the defendant, J. G. Kennedy, will * * * deliver the property in dispute in this action to the plaintiff, if such delivery is adjudged, and that he will pay all costs and damages that may be awarded against him." The court said:

"Whenever the surety has contracted in reference to the conduct of his principal in a suit or proceeding in the courts, he is concluded by the judgment, in the absence of fraud or collusion between the prosecuting party and him whom they are bound for."

In *Council vs. Averett*, 90 North Carolina, 168, the condition of the bond was that plaintiff should prosecute his action and "return the property to the defendant, if such return be adjudged, and pay to him such sum as may for any cause be recovered against the plaintiff in this action."

The court says:

"The stipulation is twofold, and it is explicit to pay whatever sum for any cause may be adjudged,

and the plaintiff assents to the recovery of what is accepted as the value of the goods. The plaintiff prosecutes his own action, and the sureties assume responsibility for whatever may be legitimately and *bona fide* adjudged against their principal, who alone is the manager of his action, and by whose conduct of it they must abide. His right to compromise in preference to hazarding the result of an inquiry into the value of the goods before a jury cannot be questioned."

So the condition of the bond in the case at bar was that the property should be delivered to said plaintiff if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause, be recovered against the defendant.

In *Mason vs. Richards*, 12 Iowa, 74, it is said:

"The proper judgment in an action of replevin, as a general rule, when the plaintiff fails to maintain his action, is for a return of the property to the defendant, both at common law and under the statute. * * * Suppose, however, no such order is made, but the court finds the value of the property and renders judgment therefor against the plaintiff, does such judgment, though irregular, have the effect of changing the liability of the surety in an action on the bond? Or, in other words, is it necessary, in order to make him liable upon his bond, for the breach now under consideration, that a judgment *de retorno habendo* should first be entered? We think not.

"The district court could enter no judgment against the surety in the original suit, for he was not in court. The plaintiff, and principal in the bond, was in court, however, and over him the court had jurisdiction. For whatever judgment the court had the power to render against him, though ever so erroneous, he will be bound. And as a judgment erroneous merely would be binding upon him, so it would be upon his surety in an action on the bond."

In *Richardson vs. Bank*, 57 Ohio St., 229, 308, 315, which seems to have been decided upon a full consideration and review of the authorities, the surety appeared and defended on the merits, as well as against the summary mode of procedure authorized by an express statute, *i. e.*, on being summarily brought before the court to show cause why judgment should not be entered against him for breach of the condition of the replevin bond by the principal, he objected to being required to answer without a petition having been filed. In passing upon this objection the court said:

"The law enters into and becomes a part of each undertaking of this kind; and the surety must be held to know that he may be called on in this summary mode to show cause why judgment should not be entered against him on a breach of the undertaking. * * * There was then no error in not requiring a petition to be filed. By signing the undertaking, he became a *quasi* party to the suit, and is held to have notice of all the proceedings thereafter in the suit that may affect his liability on the undertaking, particularly the judgment, which is *sub modo*, a judgment against him. * * * This is the extent of the proceeding. It was designed to give a speedy remedy against those who, by becoming surety on such undertakings, have assisted another in depriving a party of his property. The provision is neither harsh nor unjust, and should be liberally construed so as to afford the remedy intended in such cases. It is neither reasonable nor just that one who has been deprived of his property by a proceeding in replevin should be put to a long course of litigation in recovering compensation for what he has lost. This is the principle of justice that underlies the law. So that, whoever as surety signs a replevin bond, whether it be for the delivery of the property to the plaintiff, or for its redelivery by the defendant, assumes the obligation of making speedy restitution to the aggrieved party, as the judgment of the court may determine, if his principal does not."

* * * * *

"We think it also clear that the surety on a replevin undertaking, cannot, in the absence of fraud or mistake, be heard to question the validity, or the amount of the judgment rendered against his principal in an action on the undertaking. When he signed the paper, he undertook to pay what might be so ascertained and adjudged against his principal. He cannot, therefore, be heard to say that the judgment is wrong. If there were any errors in the judgment, he should, through his principal, have caused them to be corrected in a proper proceeding. Not having done so, and the judgment being in force, and unreversed, he is bound by it to the same extent that his principal is."

To the same effect are *Christiansen vs. Mendham*, 61 New York St., 326.

Waldrop vs. Wolff, 114 Ga., 610, 620.

The case at bar is clearly distinguishable from an action on a replevin bond following a judgment of dismissal of the replevin suit for want of prosecution where there is no trial on the merits. In some of the States, such as Illinois and Indiana, there are statutory exceptions permitting the defendants to show the title or right of possession of the principal obligors in mitigation of damages. This distinction was pointed out in *Smith vs. Mosby*, 98 Indiana, 445, 448, where it was held that the judgment in the replevin suit was conclusive in a subsequent action against the sureties on the bond, both as to the ownership of the property and its value; the court saying:

"The appellees refer us to a number of cases in our own reports where it has been held that in a suit upon a replevin bond the defendants may show, in mitigation of damages, that the principal obligors either were the owners or had a lien upon the property in question. In none of these cases, however, was any judgment rendered upon the issues formed, but all of them were dismissed without any adjudication. These cases are, therefore, not in point."

Moreover, such a case as that at bar has been distinguished, in *Bridgeport Insurance Company vs. Wilson*, 34 New York, 275, 280, from a case where the covenant is one of general indemnity, merely, against claims or suits, the court saying:

"Again, covenants to indemnify against the consequences of a suit are of two classes. 1. Where the covenantor expressly makes his liability depend on the event of a litigation to which he is not a party, and stipulates to abide the result; and, 2. Where the covenant is one of general indemnity, merely, against claims or suits. To the latter class belongs the case now before us. In cases of the first class, the judgment is conclusive evidence against the indemnitor, although he was not a party, and had no notice, for its recovery is the event against which he covenanted. *Patton vs. Caldwell*, 1 Dall., 419."

In *Irwin vs. Backus*, 25 California, 214, which was an action on an administrator's bond, it was held that a decree of the probate court removing the administrator from office and appointing his successor and directing payment and delivery to the latter of a certain sum of money and a certain note belonging to the estate, was conclusive upon the sureties on the bond. The court, after reciting the conditions of the bond, saying, concerning the liability of the sureties:

"They are bound to make good the default of their principal, and cannot go behind the decree to inquire into the merits. They may show in defense either that the bond was not made, or that the decree was not made; or, if made, that the same has been obeyed; or that the same was obtained by fraud or collusion; but they cannot show that the court has erred in making the decree or that no assets ever came into the possession of the administrator, although the court has so found and adjudged. If any error has been committed, the remedy is afforded by

appeal. Until the order of decree is reversed, it is equally conclusive upon the administrator and his sureties."

In *Braiden vs. Mercer*, 44 Ohio St., 339, being an action on a guardian's bond, it was held that the sureties could not defend against the judgment of the probate court in finding the amount due the ward, as being for too large an amount, or because nothing was due the ward. The court said:

"By their bond the sureties contract with reference to the action of a court and that the principal will obey its orders and conform to such action. Can they say they are strangers to such proceedings. Upon their principal's failure to obey the orders of the court there is clearly a breach of the bond. The relation they assume to such court and its action so far makes them privy to the proceedings affecting their principal as to deny to them the right, when called upon, to call in question the grounds upon which the court based its action, and to have the same cause retried. * * *

"Indeed, it may well be considered an established principle that whenever a surety has contracted with reference to the conduct of one of the parties in some suit or proceeding in court, he is, in the absence of fraud and collusion, concluded by the judgment."

In *Heard vs. Lodge*, 20 Pick., 53, 58, it is said, concerning this defense to a suit on an administration bond:

"To most purposes, it seems to us, that the sureties on an administration bond are, as well as the principal, estopped from controverting the validity of a judgment ascertaining the amount of the debt to be paid by the administrator. They are in many respects like the sureties in a bail bond, and equally bound by the proceeding against the principal. The duty they have assumed is that their principal will pay on demand all debts ascertained by judgment of a court of law against him in his capacity as ad-

ministrator, if the estate be solvent. His failure to make payment is a breach of the administration bond. * * * We are satisfied, that as to all those matters of defense, going to the merits of the debt as between the original parties, the judgment against the administrator must be taken to be conclusive in a suit on the administration bond, where there has not been fraud or collusion."

In 2 Brandt on Suretyship and Guaranty (third ed.), section 563, the learned author comments on this subject as follows:

"Judgment entered upon the finding of a jury in a replevin suit is held to be competent and conclusive evidence as against the sureties on the replevin bond. And during the pendency of a replevin suit, the sureties on the replevin bond are held concluded by a decree in which their principal acquiesces. Nor can they defend by showing that the judgment against their principal was erroneous. Nor can they object to the form of the proceeding against their principal. The principal alone is held to be responsible for the defense, and if he waive technical or substantial objection to the manner and form of the proceeding against him, the surety is bound by the result of the litigation on its merits. And it is held that they are concluded by the judgment, though it be not in strict accord with the statute. *So also, it is held that the sureties upon a redelivery bond are bound by the judgment in the replevin suit.*" (Italics ours.)

A verdict in claim and delivery, finding the title to the property in the plaintiff and assessing its value, was held to be conclusive against the sureties of the defendant in replevin in the recent case of *Parish vs. Smith*, 66 South Carolina, 424, in which the language of the condition of the redelivery bond is essentially the same as in the case at bar.

In commenting upon the contract of suretyship the court said:

"By the terms of the undertaking the defendants not only become liable for the return of the property to the plaintiff, if the delivery thereof should be adjudged, but likewise for the payment to him of such sum as might in that action for any cause be recovered against the defendant. * * * It is clear that this is one of the class of cases referred to in *Smith vs. Moore*, 7 S. C., 209, where the recovery of the judgment is in itself the happening of the contingency in which the surety was to become bound, and consequently conclusive proof not only of a breach of the bond, but of the quantity of damage resulting therefrom. It is contended that the waiver of the plaintiff in the action in which the bond was given of claim to the delivery of the property specifically discharged the sureties on the bond. To make good this proposition it would be necessary to establish that the sureties can question the regularity of the judgment recovered in the principal action. On general principles this cannot be done; but in the present case, the insertion of the words '*for any cause*' clearly was intended to exclude the surety from alleging that the judgment was rendered for some special cause beyond the contemplation of the undertaking. (Italics ours.) These authorities conclusively show that the sureties were liable to the full extent of the verdict properly rendered under the pleadings in the action against R. J. Smith."

In the recent case of *Waldrop vs. Wolff*, 114 Ga., 610, 620, it is said by the court: "After becoming securities on the bond they must remain silent witnesses to the conflict between the parties to the suit, standing ready to fulfill at the end of the litigation the obligation they have undertaken."

The rule is the same in this court.

Thus, in *Stovall vs. Banks*, 10 Wallace, 583, it was contended in behalf of the defendants, sureties on an administration bond, that the judgment of the superior court of Morgan County, Georgia, fixing the amount of the assets

of the decedent's estate in the hands of the administrator and ordering the distribution of the whole in certain sums to the distributees, was not a final and conclusive adjudication as against the administrator's sureties, but, as against them, merely *prima facie* evidence.

In denying the correctness of this contention, it was said by Mr. Justice Strong, speaking for the court:

"It has been argued on behalf of the defendants in error that the decree of the superior court, if admitted, would have been only *prima facie* evidence against the sureties in the bond. Were that conceded, it would not justify the exclusion of the evidence. But the concession cannot be made. The decree settled that the administrator of the intestate, Alfred Eubanks, held in his hands sums of money belonging to the equitable plaintiffs in this suit, as distributees of the intestate's estate, which he had been ordered to pay over by a court of competent jurisdiction, and the record established his failure to obey the order. Thereby a breach of his administration bond was conclusively shown. Certainly the administrator was concluded. And the sureties in the bond are bound to the full extent to which their principal is bound. * * *

"Much of the argument upon both sides of this case has been devoted to the consideration of the inquiry whether the Superior Court of Morgan County and the Supreme Court of Georgia rightly adjudged that the equitable plaintiffs are entitled to a share of the estate of the decedent in the administrator's intestate. That is no longer an open question. It was concluded by the decree offered in evidence. It cannot be tried again in this case."

Unlike the statutes of certain States (see *Richardson vs. Bank*, 57 Ohio St., 299), the laws of Hawaii fail to provide for the entry of judgment against the obligors on a redelivery bond for breach of condition by *scire facias* or other summary process and without a trial by jury. If such a statute had existed in Hawaii, the entry of a summary judg-

ment under it against these defendants for a breach of the condition of the bond in question would have been wholly just and correct, according to the ruling of this court in *Hiriart vs. Ballon*, 9 Peters, 156. This was a writ of error to the District Court of the Eastern District of Louisiana to review a summary judgment entered against the plaintiff in error upon an appeal bond in pursuance of a rule of the district court. The principle relied on was that the party was entitled to a trial by jury and that no such summary judgment was authorized by law. Mr. Justice Story, speaking for the court, said:

"The laws of Louisiana allow appeals from the district courts of the State to the Supreme Court upon giving an appeal bond with security; and authorize a summary judgment upon such appeal bond, upon mere motion, in the court from whence the appeal was taken, in execution of the judgment of the appellate court. The rule of the District Court of Louisiana, therefore, follows the analogy of the laws of Louisiana, being modified only so far as is proper to suit the organization of the courts of the United States and to conform to the laws thereof. The summary judgment, therefore, was strictly authorized; and the party appellant had no right to a trial by jury. *In becoming a surety he submitted himself to be governed by the fixed rules which regulate the practice of the court* (italics ours). The judgment is affirmed, with damages at the rate of six per cent, and costs."

The case of *Washington Ice Company vs. Webster*, 125 U. S., 426, is directly in point. After levying upon property, under a writ of replevin, the sheriff delivered the property over to the plaintiff. Upon the trial, judgment went in favor of the defendant, and the jury assessed the value of the ice replevied at \$20,069.33. In ruling that the finding of the jury on the question of the value of the property replevied was conclusive against the sureties in a subsequent

action against them on the replevin bond, the court said (p. 444):

"It is also contended for the defendants in this suit that the Circuit Court erred in rejecting the evidence offered by them to show that the value of the ice replevied was less than \$10,000, at whatever time such value was to be assessed, and in ruling that the plaintiff was not precluded from showing that the value of the goods replevied was more than the \$15,000 named in the replevin writ and the bond.

"We do not think the court erred in rejecting the evidence so offered by the defendants. The writ of replevin stated that the quantity of ice was 'about thirty-eight hundred tons,' 'of the value of fifteen thousand dollars.' The bond of the 12th of August, 1870, recited that the action was for 'about thirty-eight hundred tons of ice,' 'of the value of fifteen thousand dollars.' The first return of the sheriff, dated August 13, 1870, specified the quantity of ice as 'about twenty-five hundred tons.' The amended return specified the quantity as being 2331 tons and 1851 pounds. The jury, in the trial of the replevin suit, found that the value of the ice replevied, where it was situated, at the time it was taken, was \$20,-069.33. The condition of the bond must be held to mean, that the quantity of goods replevied was to be restored, leaving it to be ascertained what that quantity was. It must be assumed, in the absence of evidence to the contrary, that the quantity named by the jury as the basis of the value they found, was the quantity named in the amended return of the sheriff. The sureties in the bond were, by its terms, so connected with the replevin suit, that they are bound by the adjudications necessarily made in it. The jury could not have found any basis for the calculation of the interest as damages, unless they had found, as they did, the value of the ice, where it was situated, at the time it was taken. The sureties are bound by that finding. * * *

"Such value was found by the jury, in finding the verdict, and a judgment having been entered thereon, the fact so found is conclusive, not only upon the

10c

parties to the replevin suit, but upon those who became sureties by the bond, to abide its event. The sureties became bound by the result of the replevin suit by virtue of their agreement contained in the bond. * * *

"The sureties in the replevin bond were represented in the replevin suit by the plaintiff therein, and were identified with it in interest, and claimed in privity with it, so as to be concluded by the proceedings in that suit. 1 Greenl. Ev., sec. 523."

The sentence last quoted, paraphrased merely so far as to apply to the slightly different state of facts, viz., the sureties in the redelivery bond were represented in the replevin suit by the defendant therein, and were identified with him in interest, and claimed in privity with him, so as to be concluded by the proceedings in that suit, we submit with deference declares the very law of the case now before the Court.

An examination of the text writers and of reported cases would seem to demonstrate beyond doubt or question the truth of the conclusion expressed by Wilder, J., in his dissenting opinion, viz., that the conclusions of the majority judges that the risk assumed by the sureties in this case was "to be responsible for the return of property, of a specified value, or in default thereof for the payment of a judgment for its (such) value, together with damages, interest, and costs," and that the subsequent amendments of the *ad damnum* clause of the declaration in replevin "increased the risk of the sureties" * * * outside of or beyond their contract and thereby caused their discharge from all or any liability on the redelivery bond, is "contrary to both principle and the great weight of the decided cases." If we are correct in this, as we believe and submit we are, it would seem to follow that the judgment of the Supreme Court of the Territory, here under review, should be reversed and the cause remanded for further proceedings, unless it should be made in some proper manner to appear to this

court that notwithstanding the absence of any cross-writ or cross-assignment of errors on the part of defendants in error, "the remaining grounds of the motion (defendant's motion for judgment *non obstante veredicto*) and the remaining exceptions not necessarily involved" (R., 121) therein, are open for argument here. With respect to such of the exceptions contained in defendant's elaborate bill of exceptions (R., p. 183-743) from the Circuit Court on the refusal of that court to enter judgment *non obstante veredicto*, as are not preserved in plaintiff's bill of exceptions on writ of error from this court,—for reasons stated in authorities above cited it is submitted that none of such exceptions are open for argument here. With respect to "the remaining grounds of the motion" for judgment *non obstante* which were not specifically passed upon or denied by the Supreme Court the result may be otherwise, though on principle it seemingly should not.

In our view the refusal or failure of the Territorial Supreme Court to pass upon such "remaining grounds" was equivalent to the denial or rejection thereof by that court, and in the absence of exception to such denial or rejection by the party aggrieved, should stand as the final disposition thereof, not open to review by this court.

But as it may be thought otherwise by some, we will briefly make reply to such of said "remaining grounds" as seem still to be relied upon by defendants in error.

With respect to the suggestion that sureties upon a re-delivery bond conditioned for the delivery to the plaintiff in replevin of "certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of \$15,000 as stated in the affidavit filed therein" (R., 20) "if such delivery be adjudged," and for payment to said plaintiff "of such sum as may, for any cause be recovered against the defendant" (R., 21), may be discharged by the subsequent enactment of local or Federal legislation over which

the plaintiff had no control and which did not in any wise purport to affect the contract of the obligors in said bond, but merely the method of enforcing it; it would seem to be sufficient to say that parties to contracts have no vested right to insist that legislatures, during the pendency of said contract or the continuance of rights and liabilities thereunder shall refrain from adding to or taking from statutory remedies theretofore provided for the enforcement of or defence against such rights and liabilities, provided always that adequate remedy for such enforcement or the making of defence thereto, shall remain.

As said by this court in *Brown vs. New Jersey* (175 U. S., 172) :

"The State has full control over the procedure in its court, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with the specific and applicable provisions of the Federal Constitution."

And in *Bronson vs. Kinzie*, 1 Howard, 311, it was said :

"If the laws of the State passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments.
* * * Although a new remedy be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may

be altered according to the will of the State, provided the alteration does not impair the obligation of the contract."

Any suggestion that the suit on the return bond was brought against the executors prematurely would seem to be sufficiently answered by the counter-suggestion that that matter is solely one of local practice and procedure which the Supreme Court of the Territory, in so far as this case is concerned, appears to have approved. Again, on the authority of cases cited above, such matters of local practice and procedure in Territorial courts are not open for review here.

A further answer might be made referring to the provisions of sections 1853 and 1854, Revised Laws of Hawaii, respecting suits against executors and administrators, and sections 71 and 75 of the Territorial act of April 22, 1903 (Session Laws of Hawaii, 1903, 207, 209), Revised Laws of 1905, sections 1861-1865, providing for the entry of judgment and issuance of execution pending exceptions upon good cause shown, etc.

Henry Waterhouse, the only solvent obligor on the redelivery bond, having died at Honolulu on or about February 20, 1904 (Rec., 77), notice to creditors of said deceased was given by William Waterhouse and Albert Waterhouse, executors of the last will and testament of said deceased, by publication thereof on April 5, 12, 19, and 26, and May 3, 1904, in the Evening Bulletin, a newspaper published daily at Honolulu, to present their claims to said executors, duly authenticated, with the proper vouchers, within six months after the first publication thereof (Rec., 84, 85).

At that time the Hawaiian statute of limitations required a claim against the estate of a deceased person to be presented to his executors within six months from the date of the first publication of notice to creditors, or be forever

barred, and further provided, as to a claim rejected by the executors, that suit must be brought thereon within two months after notice of rejection, or it would be forever barred, the provisions of the statutes applicable to this subject being as follows:

"Immediately after the appointment of any executor or administrator of any estate, he shall advertise in such newspaper or newspapers as the court shall direct, for as long a time as the court may order, at least once a week for four weeks, a notice to all creditors of the deceased to present their claims, duly authenticated and with the proper vouchers, if any exist, even if the claim is secured by mortgage upon real estate, to him, either at his residence or place of business, within six months from the day of such publication. And if such claims be not presented within six months from the first publication of the notice, or within six months from the day they fall due, they shall be forever barred, and the executor or administrator shall not be authorized to pay them.

"If any claim be rejected by the executor or administrator, he shall give written notice of such rejection to the creditor, and suit must be brought upon it against the executor or administrator within two months after such notice is given, or within two months after the same becomes due, or it will be forever barred."

Sess. Laws Hawaii (1898), c. 37, §§ 1, 2.

Rev. Laws (1905), §§ 1851, 1853.

Having failed to enforce its judgment by execution, upon the return of the same unsatisfied by the sheriff on May 27, 1904, plaintiff was confronted with the alternative of losing all benefit of its judgment by reason of this short limitation act, or of proceeding at once against the estate of Henry Waterhouse, deceased, for the amount of its judgment, regardless of the consequences of the appeal to the Territorial Supreme Court upon bill of exceptions by the defendant in the replevin suit, which could not be heard

until after the lapse of the six months' period of limitation, and was not, in fact, argued until November 14, 1904 (*Bierce vs. Hutchins*, 16 Haw., 418). As the executors of the deceased surety first published notice to creditors to present their claims on April 5, 1904, the bar of the statute would have become complete with the expiration of October 5, 1904, if plaintiff meanwhile had failed to present its claim, provided the claim fell due so that the statute began to run on or prior to April 5, 1904.

The authorities are agreed that the statute of limitations commences to run as against a right of action for breach of the condition of a replevin or delivery bond from the date of the judgment for a return of the property, which in this case was March 19, 1904 (Rec., 34). *Cobbey on Replevin* (2d ed.), secs. 1299, 1311, 1313, 1314, *et seq.*; *Hagan vs. Lucas*, 10 Peters, 40; *Lovejoy vs. Bright*, 8 Blackf., 206; *Evans vs. King*, 7 Mo., 411; *Lockwood vs. Perry*, 9 Met., 444; *Burkle vs. Luce*, 1 Comstock (N. Y.), 163; *McRea vs. McLean*, 3 Port. (Ala.), 138; *Delay vs. Yost*, 59 Kan., 496.

No order of court was entered in the replevin suit staying execution on the judgment, but the perfecting of an appeal in any case from a judgment of a circuit judge, by virtue of sections 71 and 75 of the act of April 22, 1903, above quoted, is regarded as operating as an arrest of judgment and stay of execution, subject to the power of the court, upon good cause shown, to allow execution to issue pending the appeal, unless the appellant shall, within such time as shall be allowed by the judge, deposit a supersedeas bond in such amount and with such sureties as shall be approved by the judge, etc.

Obviously, if plaintiff might enforce its judgment by execution, as it was given the right to do by the orders of the court, and if defendant failed to return the property or to

pay the money, the conditions of the bond had been broken and plaintiff's cause of action thereon had accrued.

These proceedings for the enforcement of the judgment in replevin by execution were had in pursuance of the provisions of sections 71 and 75 of the act of the Territorial Legislature, entitled, "Act 32. An act to amend chapter LVII of the Laws of 1892, entitled 'An act to reorganize the Judiciary Department,' " etc., approved April 22, 1903.

Sess. Laws Hawaii (1903), 207, 209.

Rev. Laws (1905), secs. 1861, 1865.

Section 71 provides in substance that "An appeal duly taken and perfected in any case from a judgment * * * of a circuit judge * * * shall operate as an arrest of judgment and stay of execution; provided, however, that the judge * * * may, upon good cause shown, allow execution to issue * * * pending such appeal, unless the appellant shall, within such time as shall be allowed by the judge, * * * deposit a bond in such amount and with such sureties as shall be approved by the judge * * * (the amount to be not less than double the amount of the judgment * * *) conditioned for the prosecution of the appeal without delay, and for the payment or other performance, as the case may be, of the judgment, order, or decree, or part thereof that may be rendered or affirmed in the Appellate Court." * * *

Section 75 provides in like manner with reference to a case to be reviewed upon exceptions, that "Upon the allowance of such bill of exceptions and the deposit of twenty-five dollars, or a bond of the same amount, by the party excepting, with the clerk of such court, for costs to accrue in the Supreme Court, the questions arising thereon shall be considered by the Supreme Court; but judgment may be entered and may be enforced or arrested pending such exceptions, as provided in section 71 in the case of an appeal, *mutatis mutandis*."

More than six calendar months had expired since the will of Henry Waterhouse had been probated before this suit against his executors was filed. Under the statutes of Hawaii, Revised Laws, sec. 1854, the claim was justiciable irrespective of whether it had been rejected by them.

Again this also involves a matter of purely local practice and procedure, which is not reviewable in this court.

The matters specified in grounds numbered 1, 3, 4, and 14 of the "Motion for judgment *non obstante veredicto*" are not matters of substance on this writ of error and with the possible exception of ground numbered 3 do not appear to have been seriously urged by the moving party at any time. Ground numbered 3 undertook to present in different form the same question presented in ground numbered 5, and the objections above suggested to the latter ground equally apply to the former.

The matters specified in grounds 9, 10, 11, 12 and 13 (Rec., 107) all relate to matters of fact, depending for settlement upon conflicting evidence—all of which matters were submitted to the jury under the proper instructions of the trial court and each of which was foreclosed by the verdict of the jury.

Upon the whole case as presented by so much of the transcript of the record as may properly be examined and considered on this writ of error, it is respectfully submitted that the judgment of the Supreme Court of the Territory of Hawaii entered herein on the 23d day of November, 1909, should be reversed and the cause remanded to that court with an instruction to reverse the judgment of the circuit court of the first judicial circuit of Hawaii entered *non obstante veredicto* in this cause on the 29th day of May, A. D. 1909, and to remand the case to that court with an instruction to reinstate of record its judgment of May 29, 1908.

entered on the verdict of the jury in favor of the plaintiff, William W. Bierce, Limited, and against the defendants in error, William and Albert Waterhouse, executors, &c., of Henry Waterhouse, deceased.

Notwithstanding the final judgment and mandate of this Court entered and issued pursuant to the opinion of the Court reported in 205 U. S., 340, the lower court refused to enter a final judgment affirming the judgment of the trial court in the replevin suit in favor of William W. Bierce, Limited, saying:

"This case came before this court upon a bill of exceptions of the defendant comprising 46 exceptions, most of which were argued and relied upon. These presented questions relating to the right to amend, to the admission of evidence, and to the form of the judgment as well as the questions of election, waiver and conditional sale. This court, however, in sustaining those exceptions involving the question of election, found it unnecessary to pass upon the other points. Upon the petition for rehearing the court stated that for the purposes of the original decision it was assumed that the contract was one of conditional sale, or an executory contract to sell upon a condition precedent.

"The Supreme Court of the United States passed upon two points, namely, whether the acts done by the plaintiff constituted an election as a matter of law, and whether the sale was on the condition precedent. The opinion concludes: 'Some other subordinate suggestions were made, but we have disposed of the only questions that are open here.'" (Bierce *vs.* Hutchins, 205 U. S., 340 and 349.) "The mandate reverses the decree of this court with costs and concludes: 'And it is further ordered that this case be and the same is hereby remanded to the said Supreme Court for further proceedings in conformity with the opinion of this court.'

"No question was made of the right of the plaintiff to a judgment for costs in conformity with the man-

date, but we are of opinion that the plaintiff is not entitled at this stage of the proceedings to an overruling of all of the defendants' exceptions and an affirmance of the judgment. The points decided by the Supreme Court of the United States are, of course, concluded, but the defendant brought other exceptions before this court which were not passed upon owing to the conclusive character of the point erroneously decided in his favor. In obeying a mandate from the Supreme Court we are at liberty to look at the opinion of that court and to consider and decide any question left open by the mandate and opinion.

Ex parte The Union Steamboat Co., 178 U. S., 317, 319.

"The defendant should be allowed to present any questions raised by his bill of exceptions not covered by the opinion of the Supreme Court of the United States, and the plaintiff's motion, except in so far as it asks judgment for costs, is denied." *18 Haw 374, 375*

To revise this action an application was made to this court by William W. Bierce, Limited, for leave to file a petition for mandamus and an order to show cause was issued thereon December 23, 1907. The fate of this order to show cause is uncertain. No return was ever made upon it and the reserved exceptions were finally overruled by the Supreme Court of the Territory and the cause proceeded to a final judgment in favor of the plaintiff in the circuit court.

It must be observed that if the position taken by the Supreme Court of the Territory with respect to its right to render a final judgment subject to review in this court by writ of error or appeal, and at the same time to reserve or hold back certain questions of law unpassed upon, is a tenable position, then it would seem to be practically impossible ever to put an end to this particular piece of litigation.

In the replevin suit the defendant Hutchins, Trustee, had only taken the precaution to note of record 46 points of ex-

ception, of which the Supreme Court of the Territory only passed upon two when rendering its final judgment, which was subsequently reversed by this court, whereas in the course of the suit now before this Court on the return bond, the defendants, sureties on the bond, having learned wisdom from the experience of their principal in the former suit, have forehandedly reserved of record in excess of 130 exceptions, with some 14 additional or correlated grounds of motion for judgment. Of these the Supreme Court in the majority opinion, passing upon a single point or ground specified in the motion for judgment, and observed that "the remaining grounds of the motion and the remaining exceptions not necessarily involved are not passed upon." (Rec., 121.) Notwithstanding which, it entered judgment against plaintiff in error here in every essential of form and substance, final and conclusive, as to his rights in the premises.

If, judging from the opinion and course of action of the Supreme Court of the Territory in the replevin case, the above indicated reservations with respect to "grounds of motion" and "remaining exceptions not necessarily involved" was made for the purpose of taking further proceedings in connection with said grounds and exceptions in the event of a reversal by this court of said final judgment, it would seem that notwithstanding the well-established rule on the subject, this court may be compelled either to review cases from the Supreme Court of the Territory of Hawaii "piecemeal" (*Cotton vs. Hawaii*, 211 U. S., 162 and 170, bottom), or else litigants therein may be effectually deprived of a statutory right to secure a final judgment of their differences by this court. As the judgment of the Supreme Court in the present case is final, both in form and substance, the reservation made in the opinion of the court would seem to be of but little consequence, for every question of law raised in the lower court and presented by the record before this court is open for the consideration of this court, and its

judgment in the premises should be accepted as final and conclusive of the entire matter.

Tyler *vs.* Maguire, 17 Wallace, 263, 283.

Stewart *vs.* Salamon, 97 U. S., 361.

Illinois *vs.* Illinois Central R. Co., 184 U. S., 71, 91.

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INDEX.

	PAGE.
STATEMENT	I
POINTS AND AUTHORITIES.....	20
I. <i>The sureties were discharged by the amendments and the recovery and judgment.</i>	20
(a) The bond was given in an ancillary proceeding to secure the possession of property before judgment.....	20
(b) This is a statutory bond.....	23
(c) Contract of surety to be strictly construed.....	26
(d) Surety has a right to stand upon the exact terms of his contract	28
(e) Plaintiff is estopped by its affidavit, on the faith of which the surety contracted.....	32
(f) Increase in the pecuniary obligation, without assent, discharges the surety.....	38
(g) Sureties' liability arises in the ancillary proceeding, and any judgment that is obtained in the principal action is not binding on them.....	40
(h) Plaintiff's right to take possession of the property before judgment failed when the amendment was made, and, with this, the consideration of the agreement of the surety failed	42
(i) Construction put upon the local statute by the local court should be persuasive, if not controlling, in this court.....	44
II. <i>The sureties cannot be held under a subsequent amendment of the Organic Act granting an appeal to this court.</i>	46
(a) All proceedings subsequent to denial of petition for rehearing are <i>coram non judge</i>	47
(b) If amendment to Organic Act applied, the granting of the new right of appeal to another jurisdiction extended the liability of the surety.....	49
III. <i>The sureties cannot be held under the Act of 1903, Chapter 32, Sections 17, 18 and 19, (Revised Laws, 1905, Sections 1861, 1864 and 1865).</i>	56
(a) If the act applies to this action, instituted by its passage, the passage of the act discharged the surety.....	56
(b) The Act of 1903 does not apply to this case.....	56
IV. <i>The action was prematurely brought against the executors.</i>	58
V. <i>The return of the property satisfied the obligation of the bond; or, if not sufficient, the offer to return, coupled with the failure either to accept or reject discharged the surety....</i>	63
(a) The uncontradicted evidence in this case shows a return of the property to the plaintiff.....	63

	PAGE.
(b) The offer to return discharged the sureties.....	66
(c) Upon the tender by Hutchins, the plaintiff was obliged to accept or reject the tender within a reasonable time..	69
VI. <i>The execution was improperly admitted.....</i>	72
VII. <i>The whole procedure of the court on the instructions given and refused and the rulings on evidence was erroneous....</i>	76
VIII. <i>The admission of the trust deed—Hutchins to The Henry Waterhouse Trust Company, Limited—and the rulings con- cerning the same are material error.....</i>	83
IX. <i>The court erred in assuming that the judgment in the Circuit Court, in favor of Bierce and against Hutchins, terminated Hutchins' title in the property and gave it to the Bierce Company ..</i>	88
X. <i>The court erred in refusing the instructions requested by the defendants under exceptions 85, 86 and 87.....</i>	94
XI. <i>The exclusion of the testimony of the witness Colburn was material error</i>	96

APPENDIX.

	PAGE.
Revised Laws of Hawaii.....	99
Organic Act, Amendment to.....	102
Amendment, Sec. 71, Civ. L. ch. LVII, Sec. 1435.....	103
Amendment, Sec. 75, Civ. L. ch. LVII, Sec. 1239.....	104
Civil Laws, Sec. 1239.....	104

CASES CITED.

	PAGE.
Achi vs. Alapai, 9 Haw. 591, 592.....	23
Adler vs. Green, 18 W. Va. 201.....	75
Aesch vs. Demass, 34 Mich. 95.....	55
Ah Leong vs. Kee You, 8 Haw. 416, 418.....	23
Alwood vs. Mansfield, 81 Ill. 314.....	54
Anderson vs. Hapler, 34 Ill. 436; 85 Am. Dec. 318.....	20
Am. & Eng. Enc. of Law, Vol. 24, p. 536.....	73
Aycock vs. Martin, 37 Ga. 124; 92 Am. Dec. 64.....	50
Bailey vs. McCormick, 22 W. Va. 92.....	55
Bank vs. Barnes, 29 Tenn. 244.....	73
Bardwell vs. Stubbett, 17 Neb. 485; 23 N. W. 344.....	20
Barnitz vs. Beverly, 163 U. S. 118, 127.....	25, 51
Bauer vs. Cabanne, 105 Mo. 110, 118, 119.....	31
Beach's Appeal, 58 Conn. 473.....	90
Beardsley vs. Beardsley, 138 U. S. 262.....	88
Berwick vs. Oswald, 3 El. & Bl. 653, 678.....	26
Bickle vs. Beseke, 23 Ind. 18.....	69
Bierce vs. Hutchins, 16 Haw. 418, 717.....	12
" " " 18 Haw. 374.....	12
" " " 18 Haw. 511.....	12
" " " 19 Haw. 398, 405.....	29
" " " 205 U. S. 340.....	88, 12
" " " 211 U. S. 427.....	12
Biere vs. Waterhouse, 19 Haw. 398.....	18, 45
" " " 19 Haw. 594.....	18, 47
Blair vs. Williams, 4 Litt. (Ky.) 34.....	54
Brine vs. Insurance Co., 96 U. S. 627.....	51
Bronson vs. Kinzie, 1 How. 311.....	50, 25
Brookshier vs. McIlwrath, 112 Mo. App. 687; 87 S. W. 607.....	54
Bryson vs. McCrary, 102 Ind. 1; 1 N. E. 55.....	50
Butts vs. Woods, 14 N. M. 187; 16 Pac. 617, 618.....	50, 36
Butz vs. Muscatine, 8 Wall. 583.....	50
Capital Lumbering Co. vs. Learned, 36 Ore. 544.....	36
Carrico vs. Taylor, 3 Dana 33.....	72
Ching Tam Shee vs. Oriental Life Ins. Co., 19 Haw. 663.....	59
Christmas vs. Russell, 5 Wall. 290.....	51
City of Lafayette vs. James, 92 Ind. 240.....	50
Clark vs. Reyburn, 8 Wall. 332.....	51
Copper Queen Min. Co. vs. Arizona, 206 U. S. 474.....	45
Corn Exchange Bank vs. Blye, 102 N. Y. 305; 7 N. E. 49.....	61
Cotton vs. Hawaii, 211 U. S. 162.....	46
Crane vs. Buckley, 203 U. S. 441, 447.....	27
Cross vs. Allen, 141 U. S. 528.....	29
Daniels vs. Tearney, 102 U. S. 419.....	51
Deleamar vs. Hobron, 3 Haw. 748.....	89
Dillingham vs. Hook, 32 Kas. 189; 4 Pac. 168.....	51

Douglass vs. Douglass, 21 Wall. 98.....	24, 72
Dredla vs. Baache, 60 Neb. 665; 83 N. W. 916.....	61
Dresel vs. Jordan, 104 Mass. 407.....	64
Drinkwine vs. Eau Claire, 83 Wis. 428; 53 N. W. 673.....	49
Driscoll vs. Holt, 170 Mass. 262; 49 N. E. 308.....	39
Dry Goods Co. vs. Reynolds, 64 Fed. 560.....	71
Earnshaw vs. United States, 146 U. S. 60.....	70
Elliott vs. Cronk's Admr., 13 Wend. 35.....	62
Ellsworth vs. Thayer, 4 Pick. 121.....	61
Espy vs. Conner, 76 Ala. 501.....	61
Freeman on Executions.....	72, 73, 75
Fulton vs. Black, 21 Tex. 424.....	61
Garesche, Re, 85 Mo. 469.....	52
Gayso vs. Hickey, 4 La. 301.....	74
Goff vs. Kellogg, 18 Pick. 256.....	61
Gordon vs. Jenney, 16 Mass. 465.....	32
Green vs. Biddle, 8 Wheat. 1.....	50
Greenleaf on Evidence, Vol. 1, Sec. 22 (16 Ed.).....	33
Greenleaf on Evidence, Vol. I, Sec. 27 (16 Ed.).....	33, 36
Haldeman vs. Powers, 104 Ky. 525; 45 S. W. 662.....	55
Hamilton, The M. M., 17 Fed. Cas. 555.....	71
Harmon vs. Childress, 11 Tenn. 380.....	74
Harrison vs. Magoon, 205 U. S. 501.....	46
Hassell vs. Bank, 39 Tenn. 380.....	74
Hentsch vs. Porter, 10 Cal. 555.....	61
Hessong vs. Pressley, 86 Ind. 555.....	74
Hong Kim vs. Hapai, 13 Haw. 328.....	88
Hoyt vs. Bonnett, 50 N. Y. 538, 543.....	62
Huggefords vs. Ford, 11 Pick. 222, 223.....	34
Hutchins, Trustee, in Re, 15 Haw. 624, 672.....	9
Hutchins vs. Bierce, 211 U. S. 429.....	47
Jeter vs. Langhorne, 5 Gratt. 193.....	55
Jones on Mortgages.....	86, 87
Kafer vs. Harlow, 5 Allen 348.....	33
Kawananakoa vs. Polyblank, 205 U. S. 349.....	45
Kealoha vs. Castle, 210 U. S. 149, 153.....	45
Keenan vs. Saxton, Admr., 13 Ohio 41.....	61
Kidd vs. Chapman, 2 Barb. Ch. 414.....	62
Langley vs. Adams, 40 Me. 125.....	39
Lapsley vs. Brascars, 4 Litt. (Ky.) 46.....	54
Lawyers Reports Annotated (N. S.), Vol. 8, p. 240.....	71
Lee vs. Hastings, 13 Neb. 508; 14 N. W. 476, 478.....	25
Leggett vs. Humphreys, 21 How. 66, 76.....	30
Leighton vs. Brown, 98 Mass. 515.....	33
Leonard vs. Whitney, 109 Mass. 265.....	64
Lindley vs. Kelley, 42 Ind. 294.....	74
Lord Arlington vs. Merrick, 2 Saund. 412.....	30
Ludlow vs. Simond, 2 Cai. Cas. 1.....	27
McCandless vs. Lansing, 19 Haw. 474.....	71
McCrovys vs. Chaffin, 31 Tenn. 307.....	73
McCurdy vs. Brown, 8 Mo. 550.....	52
McGahey vs. Virginia, 135 U. S. 693.....	51

Magee vs. Life Ins. Co., 92 U. S. 93.....	27
Meheula vs. Pioneer Mill Co., 17 Haw. 91.....	48, 47, 46
Middleton vs. Bryan, 3 Maule & S. 155.....	34
Miller vs. Steen, 30 Cal. 403; 89 Am. Dec. 124.....	90
Miller vs. Stewart, 9 Wheat. 680.....	30, 28, 27, 25
Mix vs. Vail, 86 Ill. 40.....	56, 54, 26
Moss vs. Sleeper, 58 Me. 331.....	39
Myers vs. Parker, 6 Ohio St. 501.....	49, 31
Nofsinger vs. Hartnett, 84 Mo. 549.....	53, 54
Nunez vs. Dautel, 19 Wall. 560.....	71
Ogden vs. Saunders, 12 Wheat 256.....	54
Oklahoma Vinegar Co. vs. Hamilton, 132 Ala. 593; 32 So. 306.....	71
Oregon, The, 158 U. S. 186, 206.....	45
Oshkosh Water Works Co. vs. Oshkosh, 106 Wis. 83; 81 N. W. 1040..	48
Oshkosh Water Works Co. vs. Oshkosh, 187 U. S. 437.....	49
Paine vs. Cent. Vermont R. R., 118 U. S. 152.....	71
Parker vs. Simonds, 8 Met. 205, 212.....	33
Parks vs. Alexander, 29 N. C. 412.....	74
Pearsall vs. Summersett, 4 Taunt. 593.....	30
Peck vs. Wilson, 22 Ill. 205.....	72
People, The, vs. Jansen, 7 Johns. 332.....	51
Phinney vs. Phinney, 81 Me. 450.....	51
Planters' Bank vs. Sharp, 6 How. 301.....	51
Prairie State Nat. Bank vs. United States, 164 U. S. 227.....	29, 28
Pritchard vs. Norton, 106 U. S. 124.....	50
Puffer vs. Lucas, 112 N. C. 377; 17 S. E. 174.....	89
Reese vs. United States, 9 Wall. 13.....	29
Reynolds vs. Collin, 3 Hill 36.....	62
Rhett vs. Poe, 2 How. 457.....	70
Robeson vs. Thompson, 9 N. J. L. 97.....	31
Ruggles vs. Berry, 76 Me. 262.....	39
Sage vs. Strong, 40 Wis. 575.....	39
Schuster vs. Weiss, 114 Mo. 158; 19 L. R. A. 182.....	52
Sedgwick on Damages (7th Ed.), Vol. 2, p. 431.....	34
Seibert vs. Lewis, 122 U. S. 284.....	50
Shapleigh vs. San Angelo, 167 U. S. 646.....	50
Sharp vs. Beddell, 5 Gilman 88.....	31
Simpson vs. Wilcox, 18 R. I. 40; 25 Atl. 391.....	23
Smith vs. Fisher, 143 R. I. 624.....	23
Smith vs. Packard, 98 Fed. 793, 800.....	35
Smith vs. United States, 2 Wall. 219.....	27
State, The, vs. Medary, 17 Ohio 554, 565.....	31
State vs. Roberts, 68 Mo. 234.....	53
Stevens vs. Tuite, 104 Mass. 328, 332.....	72, 64
Stockwell vs. Kemp, 4 McLean 80; 23 Fed. Cas. 115.....	55
Stull vs. Hance, 62 Ill. 52, 55.....	28
Supt. Public Works vs. Richardson, 18 Haw. 523, 525.....	28
Sweeny vs. Lomme, 22 Wall. 208.....	24
Swift vs. Barnes, 16 Pick. 194.....	72, 34
Thomas vs. Spofford, 46 Me. 408.....	37
Trimble vs. The State, 4 Blackf. 435, 437 (Ind.).....	35
Tuck vs. Moses, 58 Me. 461, 488.....	37
Tufts vs. D'Arcambal, 85 Mich. 185; 24 Am. St. Rep. 79.....	89
Tyler Min. Co. vs. Last Chance Min. Co., 90 Fed. 15.....	39

PAGE.

United States vs. Boecker, 19 Wall. 652.....	28
United States vs. Hough, 103 U. S. 72.....	27
United States vs. Kirkpatrick, 9 Wheat. 720.....	26
United States vs. Powell, 14 Wall. 493.....	39, 26
United States vs. Price, 9 How. 84, 91.....	27
United States F. & G. Co. vs. U. S., 191 U. S. 416.....	29
Von Hoffman vs. Quincy, 4 Wall. 535.....	50, 25
Vulcan Iron Works vs. Cyclone S. S. Plow Co., 48 Fed. 652.....	34
Walker vs. Whitehead, 16 Wall. 314.....	22
Walko vs. Walko, 64 Conn. 74; 29 Atl. 243.....	64
Walters vs. Prestidge, 30 Tex. 66, 71.....	61
Washington Ice Co. vs. Webster, 125 U. S. 426.....	37
Wells on Replevin, Sec. 453.....	37
Wells on Replevin, Secs. 569, 560.....	33, 36
West River Bridge Co. vs. Dix, 6 How. 793.....	25
Weyerhauser vs. Foster, 60 Minn. 223; 61 N. W. 1129.....	35
Winston vs. Rives, 4 Steward & Porter (Ala.) 269.....	56, 31
Williams vs. Crutcher, 5 How. 71; 35 Am. Dec. 422.....	75
Willis vs. Crooker, 1 Pick. 203, 205.....	39
Wiseman et al. vs. Lynn, 39 Ind. 250, 259.....	35
Woodson vs. Johns (Mumf.), 18 Va. 230.....	55

Supreme Court of the United States.

OCTOBER TERM, 1910

No. 508

WILLIAM W. BIERCE, LIMITED,
Plaintiff in Error,

vs.

WILLIAM WATERHOUSE AND ALBERT
WATERHOUSE, EXECUTORS UNDER
THE WILL AND OF THE ESTATE OF
HENRY WATERHOUSE, DECEASED,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This action was brought October 12th, 1904, against defendants in error as executors of the will of Henry Waterhouse, deceased, Arthur B. Wood and Clinton J. Hutchins, Trustee, the latter the principal, with Waterhouse and Wood as sureties, on a bond in the penal sum of \$30,000 dated the 21st day of July, 1903, given in a replevin action brought by the plaintiffs in error in the Circuit Court of the

Third Circuit of the Territory of Hawaii on the 20th day of July for the recovery from said Hutchins of certain rails, rolling-stock and other railway material used in connection with the sugar plantation of the Kona Sugar Company, on the Island of Hawaii, the property being alleged in the original complaint (Tr. p. 9), in the affidavit (Tr. p. 17), and in the return bond sued on (Tr. p. 20) as "of the actual value of \$15,000," and in the original complaint in this action (Tr. p. 688) as "certain property specifically set forth in the complaint filed in said action, of the alleged value of Fifteen thousand dollars."

The case was transferred from the Third Circuit to the First Circuit on December 14, 1903, by a stipulation between the attorneys of the plaintiff and defendant Hutchins (Tr. p. 205).

Upon the trial, the allegation of the actual value of the property was amended to \$20,000 (Tr. p. 13); and the complaint was also amended by counting on a contract of March 13, 1901, instead of a prior contract of February 2, 1900, supplemented by the contract of March 1, 1901 (Tr. pp. 10, 11). The Court, sitting without a jury, having on the 12th day of March, 1904, found the value to be \$22,000 (Tr. p. 233), the complaint was again amended in accordance on March 19, 1904 (Tr. p. 13), when judgment was rendered for the return of the property or the payment of \$22,000, its value, damages in the sum of \$1045, and costs amounting to \$50.50 (Tr. pp. 34-36).

A motion for a new trial was made March 19, 1904 (Tr. p. 207). On March 28, 1904, on motion of the plaintiff, the defendant was ordered to file a new redelivery bond, with two sureties, on or before the 2nd day of April, 1904, which time was extended subsequently to the 6th day of April, 1904 (Tr. pp. 220, 221); and on the 8th day of April, 1904, the Court ordered that execution issue, unless before the 15th day of April, 1904, a bond in not less than double the amount of judgment, with sureties, conditioned for the prosecution of the exceptions and for the performance and payment of the judgment which might be rendered by the Supreme Court, be filed (Tr. pp. 225, 226). No bond having been filed, on the 15th day of April, 1904, an execution was issued ordering the sheriff to take possession of the property and deliver the same to the plaintiff, and, in event that he could not secure possession of the property, to levy upon the personal or real property of the defendant to realize said sums.

Henry Waterhouse died in Honolulu on February 20, 1904. By his will he appointed the defendants William Waterhouse and Albert Waterhouse executors, who upon probate of the will qualified as such and gave notice to creditors for the presentation of claims within six months after the first publication, which was on April 5, 1904 (Tr. p. 238).

On the 6th day of September, 1904, the plaintiff presented a claim to Albert Waterhouse, in which claim the return bond was dated the 21st day of July, 1904, and the copy was further not authenti-

cated. This claim was rejected and returned to the Bierce Company September 26, 1904.

A new claim, corrected in these particulars, was presented September 30, 1904, to Albert Waterhouse, one of the executors, accompanied by a letter (Tr. p. 159) stating that it was put in in place of the former one because of these defects, and asking for prompt action. Albert Waterhouse consulted his attorneys and his co-executor, William Waterhouse, who was then in Pasadena, in the State of California, but before any action had been taken by the executors on the claim this suit was brought October 12, 1904 (Tr. p. 337).

In the meantime the plaintiff, through its attorneys in fact and at law, had given options for the purchase of the property in suit, amongst others, to Alexander & Baldwin, Limited (Tr. p. 484), and on the 14th day of April, 1904, had given to the Kapiolani Estate, Limited, which was making some claim adverse to Hutchins, the Kona Sugar Company and to Bierce, an option for \$20,000 "for 30 days from the date when the Kapiolani Estate, Limited, shall be notified in writing that the option heretofore given by William W. Bierce, Limited, to Alexander & Baldwin, Limited, of Honolulu, is not to be taken up." The option was further dependent on the Bierce Company's obtaining permission for the property to remain on the lands where it was during the life of the option, unless the Kapiolani Estate should choose to bear the expense of removal (Tr. p. 160).

On the 15th of April an execution was issued and delivered to the plaintiff's attorneys (Tr. p. 328), but was not delivered to the sheriff until the 23rd day of May, 1904 (Tr. pp. 469, 470), having been in the hands of the plaintiff's attorneys from the 15th of April.

On April 18th plaintiff's attorneys demanded the delivery of the property in suit "at any convenient and appropriate place that you may name," reciting that a large part of the property was claimed by others and that no questionable delivery would be taken, giving to April 19th for a reply; also making a demand for the damages. On the same day Hutchins delivered these attorneys an instrument purporting to return all the property "in the same condition as and in the exact situs where the same was when I purchased it at the receiver's sale" and "in the same condition as and in the exact situs where the same was received by me from the High Sheriff," reciting that the return and delivery was made in pursuance of the order of the writ, without prejudice to the right to pursue the bill of exceptions, at the same time paying the damages (Tr. pp. 151-153).

On the 19th of April notice was given that the Alexander & Baldwin option had not been taken up and that the time limit would begin to run (Tr. p. 161).

On April 21st the plaintiff's attorneys replied that the purported redelivery "is satisfactory and acceptable only in the event of our being able under it

to take actual possession," refer to certain alleged claims, and conclude: "We will at once notify you in the event we are unable to secure actual possession of the property. We also take it for granted that from your standpoint, a redelivery having been made, you will not use or attempt to use any of the property in question" (Tr. pp. 153, 154).

The property remained on the ground in the possession of the Kapiolani Estate, and the option expired by limitation, "nothing further being done" (Tr. p. 488). Neither Hutchins nor anyone claiming under him interfered with the property in any way (Tr. p. 386). The only claim of interference is that Hutchins made a deed to F. B. McStocker November 7, 1905, at a time when the Supreme Court of Hawaii had declared that Hutchins was the owner of the property and that Bierce had no interest and there was no appeal pending, the deed not referring specifically to the property, but conveying personal property conveyed to Hutchins by Dortch, "and not heretofore assigned by me" (Tr. p. 298).

Hutchins was notified of this option April 26, 1904, by a letter from the attorneys of the plaintiff, written "without prejudice to our claim now made or which may hereafter be made that you have not made a redelivery," in the event of receiving an actual redelivery to "sell the same to you at any time within 30 days from this date for the sum of \$19,000 Gold Coin, you to take the delivery of said property from us as it now lies." "This option of course is subject to the one previously given to the Kapiolani

Estate, Ltd" (Tr. p. 141). Nothing further was done until May 16, 1904, when the attorneys wrote Hutchins, stating that, "because of the illness of the writer of this letter, he having had sole charge of the W. W. Bierce, Limited, litigation, the matter of redelivery to us of the railroad material sued for has not received appropriate attention" (Tr. p. 154). The letter states that the property had been tendered and accepted, "conditioned upon its being an actual delivery," and that one Scott, interested with Hutchins, had made a statement that rails had been laid in part on lands without the permission of the owners, in some cases during the night time, and that any attempt to remove these rails would lead to trouble and litigation, asking for an explanation, and also asking for inspection of various leases "under which you claim the right to enter upon these lands and maintain there the railroad." The evidence in the case shows that Scott did not make any such statement, that the rails were not laid without the permission of the owners or during the night time, and there was no evidence that there would be any litigation over their removal (Tr. p. 387).

Hutchins' attorneys, on the 26th of May, write that a surrender had been made of all the property in response to demand, that since then it has been in the possession of Bierce and not of Hutchins, and that Hutchins is not responsible for Scott's statement, but that Scott denies having made any such statement, and stating that they do not see that any

good end can be subserved by submitting the leases (Tr. p. 155). Scott's letter, enclosed, makes a sweeping denial.

To this, on May 27th, the plaintiff's attorneys replied that they were now prepared to state that the purported delivery was not acceptable; that one of the members of the firm, Mr. Cooper, had been to Kailua to take possession of the property; "the land owners absolutely refused to allow us to remove the rails in question, and we then placed the execution in the hands of Mr. Nahale for the purpose of having the same satisfied. Mr. Nahale was also unable to take the property, and the said execution has this day been returned into the court as unsatisfied," and claiming that Scott's letter only raised a question of veracity (Tr. p. 156).

To this, Hutchins' attorneys replied, doubting the "good faith in the so-called attempt to take possession of the property in question," and reiterating again that the property had been turned over under the execution precisely as received (Tr. pp. 157, 158).

No land owners refused to allow the rails or other property to be removed. Two alone can be referred to: Paris, whose notice is found (Tr. pp. 638, 639), and who was not permitted by the court to testify that the rails on his land were not claimed by the Bierce Company. The testimony in this suit and that introduced in the replevin suit showed that none of the Bierce property was on the Paris land. These were different rails entirely (Tr. p. 440). Or

the Kapiolani Estate, which held an option for the property, and was in possession of the land which seems to have been in litigation between Hutchins and it, holding under a writ of possession, to review which a writ of certiorari had been brought in the Supreme Court (Tr. p. 474)—illegally in possession, as appears from *In Re Hutchins, Trustee*, 15 Haw. 624, 672. The plaintiff's attorneys were the attorneys for the Kapiolani Estate, and the testimony of Colburn, Scott, and Conant—three of the four persons present—is clear: that Colburn, representing the Kapiolani Estate, stated that it made no claim to the property and that Judge Cooper or the sheriff could take it, but that they could not take it out over the rails, which had been taken up by him at the boundary fences; that Judge Cooper and the sheriff were admitted to the ground by Colburn, whereas Scott was not permitted to go upon the premises, although offering to assist. The testimony of Colburn (Tr. pp. 504-508), of Conant (Tr. pp. 415-417), and of Scott (Tr. pp. 378, et seq.) shows that the property was then available, in the same condition as when originally replevied.

The remaining witness, Judge Cooper, when first called, says that Scott called attention to physical difficulties and "said that he would see that I did not get the rails" (Tr. p. 463). This, however, was in answer to a statement that he (Cooper) would go to the end of the track and take up the rails at that end and bring them in, which rails, as the evidence showed, were on the Paris land and claimed by him

and by the Kona Sugar Company, to which Bierce made no claim. He cannot give his conversation with Colburn, but says the result of his conversation was that he would not deliver the property. On cross-examination, however, he stated that his firm was acting as attorneys for the Kapiolani Estate in the writ of possession; that it was claiming to hold possession of this very property (Tr. p. 474); that the principal conversation was in regard to taking up some rails (Tr. p. 477) which were lying alongside the track (Tr. p. 480); that his firm was in negotiation with the Kapiolani Estate for a sale of the property outside the option (Tr. p. 486); that Colburn did make some remark of this kind to him: "You might try to roll the engine," or, "Well, you might try and roll the stock off, engines off and cars off." (Tr. p. 488). The witness voluntarily returned on the next day and made the following statement: That he had thought the matter over and believed he did say to Scott, when the property was tendered, that he "would not accept the property under those conditions." "I remember the incident now that I did refuse to accept the property as apparently tendered" (Tr. pp. 491, 492). That there had been a change of policy on the part of his clients (Tr. p. 493). Although he went up there for the purpose of making a genuine effort to get the property, "that is to say, if I could do so without any interference by any one; I felt that we must necessarily do that" (Tr. pp. 493, 494). "I should have taken it if I had found no objection or obstruction in the way" (Tr.

p. 494). "I went myself, instead of sending the execution to the sheriff; considered we were laying the foundation for complying with the change of policy dictated by our clients" (Tr. p. 495). We endeavored to get possession of the property up to the time there came the idea of a change of policy (Tr. p. 496). ,

The defendants were not allowed to show what this change of policy was or when it took place, or to show that Judge Cooper went up there with instructions, not to take the property, but to lay the foundation of an action on the bond, the change of policy referred to. This evidence shows that Scott was contending that Hutchins had turned over the property and that no further claim was made; while Bierce's attorney was refusing to accept it under the conditions, which conditions could only refer to the claim of Paris, which was to other property, or the fact that some of the rails had been taken up, which the Bierce Company would have had to do. This is conclusively shown by the written notice served on Nahale at the time by Scott for Hutchins, reciting that Hutchins had surrendered and delivered the property on the 19th of April and paid the damages, and objecting to any further cost being incurred or to the levy of the execution, since he had turned the property over on the 19th of April and had not exercised any right or control over it since, and requesting that as the cross-ties were the property of the defendants as little injury as possible

should be done in taking up the rails (Tr. pp. 158, 159, 385, 416, 417).

Under the instruction of Judge Cooper, the sheriff on the 23rd of May made the following return: "I return this writ of execution unsatisfied, being unable to levy upon the properties therein described" (Tr. p. 45).

Hutchins' exceptions were sustained January 28, 1905. A petition for rehearing was denied April 29, 1905, by the Supreme Court of Hawaii (16 Haw. 418, 717), and, against the objection of the defendant Hutchins, a judgment was entered May 6, 1905, in favor of the defendant (Tr. p. 743), from which an appeal was allowed by the Supreme Court of the United States December 4, 1905 (Tr. p. 744), and a *supersedeas* granted March 5, 1906 (Tr. p. 746), the judgment being reversed by a decision filed April 8, 1907 (205 U. S. 340). On September 10, 1907, the Supreme Court of Hawaii held that the defendants should be allowed to present any points raised by the bill of exceptions not covered by the opinion of this court (18 Haw. 374). On December 20, 1907, the exceptions were overruled (18 Haw. 511). From this an appeal was taken, which appeal was dismissed, for lack of finality, by this court December 14, 1908 (211 U. S. 427).

To the complaint in this action the executors filed a plea in abatement, setting up the pendency of the original action (Tr. pp. 536, 537), which was overruled (Tr. p. 538). They then filed a demurrer December 29, 1904, alleging, amongst other grounds,

the increase of value, the transfer of the action from the circuit court of the third circuit to the first circuit without the assent of the executors, and the fact that no final judgment had been entered in the original action. This demurrer was overruled (Tr. p. 540).

Various motions of continuance were made, on the ground of the pendency of the original action, which were granted against the objection of the defendants, until after the final decision by the Supreme Court of Hawaii, when, pending the appeal by the defendant in the original action, the case was set and a trial had in May, 1908. Before proceeding to trial, plaintiff dismissed as to the defendants Clinton J. Hutchins, Trustee, and Arthur B. Wood (Tr. p. 307).

At the conclusion of the evidence for plaintiff, the defendants made a motion for a nonsuit (Tr. p. 608) on various grounds, including the amendment of the complaint as to actual value, the change in the cause of action, that the sureties were released by the judgment of the Supreme Court May 6, 1905, that the action was prematurely brought, that the sureties were released by the change of venue and by the amendment of the Organic Act allowing an appeal to the Supreme Court of the United States. A motion for a directed verdict for the defendants was also made, on the grounds set out in the motion for nonsuit, and also on the further ground that the sureties were released by the tender and return by Hutchins and the action of the plaintiff. These mo-

tions were denied, as well as a request for an instructed verdict for the plaintiff, and the case submitted to the jury under instructions which left little for the jury excepting to find a verdict for the plaintiff.

The case finally ended by the jury's sending for an undischarged mortgage from Hutchins to the Henry Waterhouse Trust Company (Tr. p. 142), the existence of which the plaintiff did not know, and which had been paid (Tr. p. 517), and upon this the jury found a verdict for the plaintiff (Tr. p. 738) under an instruction (Tr. p. 710) that the mere fact that it was recorded gave notice to the plaintiff that the legal title was in Henry Waterhouse Trust Company, and, even if an actual tender was made, the jury could take into consideration the fact that the conveyance was on record in deciding whether plaintiff was justified in refusing the tender (Tr. p. 710), and (Tr. p. 711) submitting the question whether Hutchins had authority to return the property; the court having refused an instruction requested by the defendants that if the plaintiff was not influenced in refusing by any of said claims it would not be a ground to justify the refusal (Tr. p. 725).

A motion for judgment *non obstante veredicto* was made by the defendants, the fourteen grounds of which are as follows (Tr. pp. 727-729) :

“1. That the complaint does not show any cause of action against these defendants.

2. That the action was prematurely brought and

that no valid claim has been presented to the defendants and rejected by them, and that the evidence shows that a reasonable time had not elapsed after the alleged presentation of the claim before this action was brought in which to approve or reject said claim.

3. Upon all the grounds set out in plea in abatement filed by the defendants in this action.

4. That the evidence shows that there was no consideration given for the bond in suit, and that it is not binding on these defendants.

5. That at the time when this action was brought the judgment entered against the principal defendant, Clinton J. Hutchins, Trustee, was stayed by the proceedings taken on the bill of exceptions to the Supreme Court of Hawaii, and that as against the defendants in this action the Circuit Court of the First Circuit had no authority to order any further bond or security on appeal to be given, or to order said judgment to be enforced or execution to issue thereon, since the act under which said orders were made went into force on August 1, 1903, subsequently to bringing of the replevin action of Bierce vs. Hutchins, Trustee, and the giving of the re-delivery bond on which this suit was brought.

6. Because said judgment in the replevin action of Bierce vs. Hutchins rendered in the Circuit Court of the First Circuit was reversed by the Supreme Court of Hawaii on the 28th day of January, 1905, and also by the order of May 6, 1905, and that at the time of the giving of the re-delivery bond upon which this suit was brought said judgment of the Supreme Court of Hawaii was final and conclusive as to these defendants, and that the subsequent passage of the act of Congress March 3, 1905, amending the Organic Act, did not and could not affect the liability of these defendants and the sureties upon said bond, the said bond being entered into with reference to existing provisions of law and the

same becoming a part of the contract; and the subsequent reversal of the decision of the Supreme Court of Hawaii and the entry of the order of said Supreme Court setting aside its former decision and overruling the exception does not affect the sureties on said bond or the liability of the defendants in this action, whose liability was terminated by the said proceedings in the Supreme Court of Hawaii January 28, 1905, and May 6, 1905.

6a. That the contract of the sureties on the re-delivery bond was altered, changed and *or* extended by the appeal to the Supreme Court of the United States under and by virtue of the amendment of March 3, 1905, of the Organic Act by the plaintiff in the said replevin action of Bierce vs. Hutchins, Trustee.

7. Because the affidavit in replevin and the complaint based on the affidavit setting out the sworn value of the property in suit, upon which affidavit and complaint by law the re-delivery bond is based, which bond recites that the property is 'of the value of \$15,000, as stated in the affidavit filed herein,' is and are judicial admissions made by the plaintiff in this action, upon which the sureties in signing said re-delivery bond had a right to rely, and as to the sureties, the defendants in this action the plaintiff is estopped to claim that the value of said property is more than \$15,000; and the subsequent proceedings by which the allegations of said complaint were amended to increase the alleged value first to \$20,000 and then to \$22,000, and the recovery of judgment for \$22,000 as the value of said property, operated to release the sureties from the obligation of said re-delivery bond and are not binding against said sureties, the defendants in this action.

8. That the amendment to the complaint in said action, by which the cause of action is alleged to arise wholly out of the contract of March 13, 1901,

and not out of the contract of February 21, 1901, constituted a change of the cause of action upon which the said re-delivery bond was given and released the sureties from their obligation under any judgment rendered in said action.

9. Because the uncontradicted evidence shows an offer to return the property in accordance with said bond, and a tender of the same, which discharged the sureties upon said bond.

10. That, whether a valid tender of said property were made or not, the offer to return, duly made, was so far accepted by the plaintiff that it operated as a discharge of the sureties upon the said bond.

11. That the so-called option to the Kapiolani Estate, Limited, and the notice to it given by the plaintiff April 19, 1904, subsequent to said offer to return, by means of which the plaintiff disabled itself for thirty days to remove the property from its *situs*, coupled with its notice to the defendant in the suit not to use or disturb the property in the meantime, and the fact that the uncontradicted evidence in this case shows that no action was taken by the plaintiff until after the expiration of said thirty days, viz., until the 20th day of May, 1904, and that the said defendant, Clinton J. Hutchins, Trustee, did not disturb or use said property during said time, in law discharged the sureties upon said bond from further liability.

12. That after the Kapiolani Estate, Limited, on April 14, 1904, had accepted from plaintiff a thirty-day option to purchase the property covered by the replevin bond, and while said option was outstanding and in force and effect, the said plaintiff had caused execution to issue in the replevin action and to be delivered into its possession on April 15, 1904, it then and there became the duty of the said plaintiff, acting in good faith to the surety on the replevin bond, to cause said execution to be immediately placed in the hands of the sheriff and exe-

cuted; that said execution was not so immediately executed, but on the contrary was held and secreted in the hands of plaintiff's attorneys at law and in fact was not placed in the hands of the deputy sheriff for the purpose of execution until May 21 or May 23, 1904, and after said option had expired; that said delay was prejudicial to the rights of the surety, and as a matter of law released the surety.

13. That the original action was still pending at the time when this suit was brought.

14. That there is no evidence upon which a verdict could be rendered for any sum against these defendants."

A motion for a new trial was also made (Tr. pp. 729-733), on numerous grounds. These were overruled (Tr. p. 739). The case was taken by exceptions to the Supreme Court of the Territory of Hawaii, and on April 12, 1909, the opinion of the court was filed, the majority holding that the increase in the allegation of the actual value of the property to \$22,000 and the recovery of judgment for that amount discharged the sureties (19 Haw. 398), and that the motion for judgment *non obstante veredicto* should have been allowed on that ground; not passing upon the remaining grounds of the motion or the remaining exceptions. A rehearing was denied May 4, 1909 (19 Haw. 594), on the 5th day of May the Supreme Court filed its decision, notice was given to the circuit court on that date (Tr. pp. 124-126), and on the 29th of May judgment was entered in that court for the defendants accordingly (Tr. p. 126); to which the plaintiff excepted, on the ground that it was contrary to law (Tr. p. 127), and

took the case to the Supreme Court of Hawaii by writ of error, seven errors being assigned, all of which are grounded in rendering the judgment *non obstante veredicto*. November 23, 1909, judgment was entered affirming the judgment of the circuit court (Tr. pp. 766, 767).

The case comes to this court on writ of error.

We are embarrassed, as we were upon the appeal by the plaintiff in the original case of Bierce vs. Hutchins, by the fact that the point passed on by the Supreme Court of Hawaii in this case, as in that, is a narrow point of law; whereas here, as in that case, we are contending that the uncontradicted facts show that the defendants were entitled to judgment. It has never been determined in this court whether the court will review more than the question of law passed upon by the court below, but in order to save any question, in case it should be contended that these points were open upon this appeal, we shall argue all the grounds of the motion for judgment *non obstante veredicto* and also, briefly, present the grounds on which our exceptions should have been sustained. As the writ of error reviews the granting of the motion for judgment *non obstante veredicto*, the whole of that motion at least is before the court.

POINTS AND AUTHORITIES.

I.

THE SURETIES WERE DISCHARGED BY THE AMENDMENTS INCREASING THE VALUATION OF THE PROPERTY TO \$20,000 AND \$22,000 AND THE RECOVERY OF JUDGMENT FOR THAT AMOUNT.

(a)

The bond was given in an ancillary proceeding to secure the possession of property before judgment. The foundation of this ancillary proceeding is an affidavit in which the plaintiff fixes the actual value, and the contract is entered into with reference to the value so fixed.

At common law the action of replevin was commenced by an original writ issued out of the court of chancery to the sheriff of the county where the goods and chattels were to be replevied. To obviate this inconvenience in distant parts of the kingdom, the statute of Marlbridge, 52 H. 3, c. 21, was passed, providing for a complaint to the sheriff, which dispensed with the writ, and the proceedings were taken under what was called "a proceeding by plaint." (*Anderson vs. Hapler*, 34 Ill. 436; 85 Am. Dec. 318. *Bardwell vs. Stubbett*, 17 Neb. 485; 23 N. W. 344.) But the statute of Marlbridge did not abolish the method by original writ (Co. Lit. 145,

F. N. B. 69). By the statute of Westm. 2 (13 Ed. 1, st. 1) it was provided that the sheriff should receive from the plaintiff pledges for pursuing the suit and for the return of the beasts if return be awarded.

Under the American system the plaint or affidavit may be the foundation of the action itself or of an ancillary or collateral proceeding, by which the plaintiff can obtain the possession of the property before the conclusion of the action. If the foundation of the action, it is jurisdictional; if the foundation of the ancillary proceeding, it is only jurisdictional as to that (34 Cyc. 1428). In a number of States there are statutory provisions providing for a return to the defendant before delivery to the plaintiff, upon a prescribed bond or undertaking. In Pennsylvania and the Federal court this seems to be the practice without statute (34 Cyc. 1459).

In Hawaii, Chapter 34, Revised Laws of 1905 (Laws of 1884, Ch. 38), provides that the plaintiff in a replevin action may claim the delivery of the property sought to be recovered at any time before issue is joined, provided he makes an affidavit showing, among other things, (1) a particular description of the property and "(4) the actual value of the property" (Sec. 2102). By an endorsement on the affidavit or other written request, he can give notice to seize the property (Sec. 2103), provided he accompanies it with a written undertaking, with two or more sureties, "in double the value of the property as stated in the affidavit," whereupon the sheriff "shall forthwith take the property described

in the affidavit" and "serve on the defendant a copy of the affidavit, notice and plaintiff's undertaking" (Sec. 2104). After holding the person approving the sureties responsible for their sufficiency and providing for objections to the surety and justification, the statute directs (Sec. 2109) delivery to the plaintiff, unless the defendant require the return thereof by giving the sheriff a bond executed by two sureties "to the effect that they are bound in double the value of the property *as stated in the affidavit*" (Sec. 2111). All the notices, undertakings and affidavits, and the proceedings of the sheriff, are to be returned into court.

This act has been construed, and it has been held, that the proceedings by which possession of property is secured are entirely independent of the main action.

"It becomes necessary to examine the Act, commonly called the 'Replevin Act' (Chapter XXXVIII of the Laws of 1884), under which the horse in question was seized. Its title is, 'An Act to regulate the Practice in Suits for the Recovery of Personal Property.' The first section prescribes that 'the plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before issue being joined in such action, claim the delivery to him of such property, as provided in this chapter.' The statute thereafter prescribes the steps which the plaintiff must take in order that the property shall be delivered to him. This process is entirely distinct from the summons, is served on the defendant, and before issue is joined. The summons discloses the plaintiff's claim of title to the property, and the ob-

ject of the suit is to try this title. The process detailed in the Act is merely to enable the plaintiff to obtain immediate possession of the property he claims. An action of replevin, or a suit to obtain possession of personal property, may be begun without resorting to this Act of 1884, to obtain immediate possession of the property."

Ah Leong vs. Kee You, 8 Haw. 416, 418.

"But it was error to dismiss the cause even if the affidavit did not comply with the statute. Reference to the statute of replevin makes it clear that the proceedings by which a plaintiff may obtain immediate possession of personal property for which he brings action to recover are entirely independent of such action. He may not desire the immediate possession of the property and not file any affidavit. In such case the action would proceed and the title to the property be tried. The legal effect of a defective affidavit in replevin would be *merely to annul the delivery taken in pursuance of it*. The legality of the seizure is the only question involved and not the right in the property. We so held in *Ah Leong vs. Kee You*, 8 Haw. 418."

Achi vs. Alapai, 9 Haw. 591, 592.

And such is the rule elsewhere. (34 Cyc. 1429, and cases cited. *Smith vs. Fisher*, 13 R. I. 624. *Simpson vs. Wilcox*, 18 R. I. 40; 25 Atl. 391.)

(b)

This is a statutory bond, into which all existing provisions of law enter, including that under which the plaintiff fixes the actual value on which the bond is conditioned. The sureties can rely upon this statutory provision, and in order to be bound

to an increased value, or by subsequent legislation, the intent of the surety to be bound must appear on the face of the bond.

The plaintiff's contention is that the surety contracts with reference to existing provisions of law, including the power to amend pleadings and process (Sec. 1738), the power of Congress and the Legislature of Hawaii to pass subsequent laws affecting the remedy, and that the sureties are in privity with their principal and bound by a judgment against him.

As a general proposition, the latter is settled in this court.

Sweeny vs. Lomme, 22 Wall. 208.

Douglass vs. Douglass, 21 Wall. 98.

Our proposition is that while a surety is, in the absence of fraud or collusion, bound by a judgment as to all issues necessarily adjudicated against him, these issues must be within the terms of his obligation; that while the plaintiff contracts with reference to the power to amend pleadings and process and to changes in the remedy, these changes must not be such as to alter the contract, to increase his obligation or to impose a new and additional obligation upon the sureties; further, that *all* existing provisions of law entered into the contract, and particularly that provision under which the plaintiff fixed the actual value, gave bond at double that value as a condition to the right to secure posses-

sion of the property, and the surety became bound in double that value to prevent the plaintiff's taking possession, and unless the surety contracted to be bound by an increased value or by subsequent legislation, and this appears on the face of the bond, he cannot be held liable.

"Sureties on a replevin undertaking undoubtedly are concluded by the judgment in replevin; that is, if the court finds the right of the property or right of possession in one of the parties, the surety can not attack such judgment collaterally, where there is no collusion or fraud to evade his liability on his undertaking. But they are liable only to the extent they are made so by law."

Lee vs. Hastings, 13 Neb. 508; 14 N. W. 476, 478.

The laws in force at the time and place of executing a contract, which affect the right of the parties to a contract, enter into the contract and form a part of it, without any express stipulation to that effect.

Bronson vs. Kinzie, 1 How. 311.

Von Hoffman vs. Quincy, 4 Wall. 535.

West River Bridge vs. Dix, 6 How. 793.

Walker vs. Whitehead, 16 Wall. 314.

Barnitz v. Beverly, 163 U. S. 118, 127.

In order to bind the sureties, the bond itself must show an intent to be bound by subsequent legislation as a part of the bond itself.

Miller vs. Stewart, 9 Wheat. 680.

United States vs. Kirkpatrick, 9 Wheat. 720.

United States vs. Powell, 14 Wall. 493.

Mix vs. Vail, 86 Ill. 40.

The rule in reference to the surety has been well stated by Chief Baron Pollock in *Berwick vs. Oswald*, 3 El. & Bl. 653, 678:

"I think every contract (which does not expressly provide to the contrary) must be considered as made with reference to the existing state of the law; and if, by the intervention of the Legislature a change is made in the law which in any degree affects the contract, such contract, made without some clear and distinct reference to the prospect or possibility of a change, does not hold, with reference to the state of things as altered by the new law."

The same rule must necessarily be applied to an increase of liability under an existing statute, when the contract is specifically entered into with reference to another existing statute which fixes that liability.

(c)

The defendants' contract is to be strictly construed, and doubts are resolved in favor of the surety.

The true inquiry, therefore, is, what is the rule to be applied in a case where it appears that the contract of a surety has been altered without his knowledge or consent and where it appears that the effect of the alteration is to augment his liability?
* * * "Substance of the rule is, that any variation in the agreement to which the surety has sub-

scribed, which is made without the surety's knowledge or consent, and which may prejudice him, or which may amount to a substitution of a new agreement for the one he subscribed, will discharge the surety, upon the principle of the maxim *non hoc in foedera veni.*"

Smith vs. U. S., 2 Wall. 219.

"The obligation of suretyship arises only from positive contract. This contract is construed strictly both at law and equity, and the liability of the surety cannot be extended by implication beyond the terms of his contract."

United States vs. Price, 9 How. 84, 91.

"It is elementary that the obligation of sureties upon bonds is *strictissimi juris* and not to be extended by implication or enlarged construction of the terms of the contract entered into."

Crane vs. Buckley, 203 U. S. 441, 447.

The obligation of sureties cannot be extended beyond what they have in terms assumed, and, when the obligation is under one law, which has been repealed, cannot be held to be under another law.

United States vs. Hough, 103 U. S. 72.

"A surety is 'a favored debtor.' His rights are zealously guarded both at law and equity. The slightest fraud on the part of the creditor, touching the contract, annuls it. Any alteration after it is made, though beneficial to the surety, has the same effect. His contract, exactly as made, is the measure of his liability; and, if the case against him be not clearly within it, he is entitled to go acquit. *Ludlow vs. Simond*, 2 Cai. Cas., 1; *Miller vs. Stewart*, 9 Wheat. 681."

Magee vs. Life Ins. Co., 92 U. S. 93.

A surety has a right to stand upon an exact compliance with the stipulation of his bond, and his liability cannot be extended by implication beyond the terms of his contract.

Prairie State Nat. Bank vs. United States, 164 U. S. 227. ,

Where a bond recited that the person was about to be a distiller in one place on the corner of Hudson street and East avenue, the sureties were not liable for taxes where the business was carried on at another place at the corner of Hudson and Third streets in the same town.

United States vs. Boecker, 19 Wall. 652.

"Again, the contract of a surety is strictly construed, and his liability is never extended beyond the terms of his agreement, or, at least, its manifest purport. In case of doubt, the doubt is generally, if not universally, solved in his favor."

Stull vs. Hance, 62 Ill. 52, 55.

And such is the rule in Hawaii.

"It is at least doubtful if the condition of the bond can be construed as referring to anything but the legal duties of the clerk, and a doubt is fatal to the liability of the sureties, whose undertaking is to receive a strict interpretation and is not to be extended beyond the fair scope of its terms. *Miller vs. Stewart*, 9 Wheat. 680."

Supt. Pub. Works vs. Richardson, 18 Haw. 523, 525.

(d)

The surety has a right to stand upon the exact

terms of his contract. The actual value fixed by the affidavit was an exact term of his contract, made so by statute. A variation from this term is fatal to his liability.

The case chiefly relied upon by the Hawaiian court is one in which a bond was given for the appearance of the defendant at a designated term of the court and at any subsequent term to be thereafter held, and a stipulation was entered into, approved by the court, that the case should be brought to trial only after final decrees in certain civil actions. This was held to discharge the sureties, as a change of contract, although the change was made by the court.

Reese vs. United States, 9 Wall. 13.

Of the Reese case the Supreme Court of Hawaii says:

“There was a modification, by proper authority, of the terms of the principal’s undertaking to appear, which was held to be an entire discharge of the contract of the sureties.”

Bierce vs. Waterhouse, 19 Haw. 398, 405.

The Reese case has been repeatedly approved in this court.

Cross vs. Allen, 141 U. S. 528.

Prairie State Nat. Bank vs. United States,
ubi supra.

United States F. & G. Co. vs. United States,
191 U. S. 416.

The proposition set forth in the heading is sustained by abundant authority. Thus, this court has said:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the *extent*, and in the *manner*, and under the *circumstances* pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness. * * * The whole series of them, from *Lord Arlington vs. Merrick* (2 Saund. 412), down to that of *Pearsall vs. Summersett* (4 Taunt. 593), proceed upon the ground that the undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms."

Miller vs. Stewart et al., ubi supra.

"In judging of the character or sufficiency of the defense alleged for the exemption of the appellee, there should be taken as a guide the rule, which is perhaps without an exception, that sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings. Presumptions or equities are never allowed to enlarge or in any degree to change their legal obligations."

Leggett v. Humphreys, 21 How. 66, 76.

"There is a principle that pervades the whole doctrine, on the relation subsisting between the creditor and a security debtor; that is, that the obligation shall *by no liberal intendment*, be carried, in the

smallest degree, beyond the undertaking. And again, that there is no moral obligation on the security beyond, or superadded to, the legal obligation. His obligation being essentially a *legal one*, it would follow that, if not liable in strict law, he is not liable at all. *Winston vs. Rives*, 4 Steward & Porter (Ala.) 269. * * * The language of Judge Trumbull, of the Supreme Court of Illinois, in *Sharp vs. Beddell*, 5 Gilman 88: * * * 'It matters not that the parties executing the bond may have derived from it all the advantages which a perfect bond would have given them, or that they even intended to execute such a bond as the law required.' * * * In *Myers vs. Parker*, 6 Ohio St. 501, the Supreme Court of Ohio said: 'No principle is better settled than that a surety has a right to stand upon the *very terms* of his contract.' "

Bauer vs. Cabanne, 105 Mo. 110, 118, 119.

"The reply to all this is that the bond speaks for itself; and the law is that it shall so speak; and that the liability of sureties is limited to the exact letter of the bond. Sureties stand upon the words of the bond, and if the words will not make them liable, nothing can. There is no construction, no equity against sureties. If the bond cannot have the effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail."

The State vs. Medary, et al., 17 Ohio 554, 565.

In New Jersey it has been held that a variation between the affidavit and the writ discharges the bail bond, on the ground that, the statute requiring an affidavit in order to hold the bail, it should be stated truly in order that bail may safely come forward relying on the terms of the affidavit.

Robeson vs. Thompson, 9 N. J. L. 97.

The condition of the obligation recites that it is to deliver certain property "of the value of \$15,000 as stated in the affidavit filed therein * * * if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant." This clearly means for any sums which may be recovered for damages or for costs. The alternative judgment is not a sum recovered against the defendant, but only a sum recovered in case there is no return. It is, in other words, a fixing of the alternative value, which the plaintiff in the bond has limited to \$15,000, but which the defendant, who had no part in fixing the bond, could reduce below that sum upon the trial, as we shall hereafter show.

(e)

The plaintiff is estopped by its affidavit, on the faith of which the surety contracted. It is a solemn admission on its part, which it cannot retract as against these defendants.

The principle which underlies this is well stated by Greenleaf:

"The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case, and in the policy of the law, to prevent the great mischiefs resulting from uncertainty, confusion, and want of confidence in the intercourse of men, if they were permitted to deny that which they

have deliberately and solemnly asserted and received as true."

1 Greenleaf on Evidence, Sec. 22, p. 117 (16th Ed.).

"In addition to estoppels by deed, there are two classes of *admissions* which fall under this head of conclusive presumptions of law; namely, *solemn admissions*, or admissions *in judicio*, which have been solemnly made in the course of judicial proceedings, either expressly, and as a substitute for proof of the fact * * * and *unsolemn admissions*. * * * The latter class comprehends, not only all those declarations, but also that line of conduct by which the party has induced others to act, or has acquired any advantage to himself."

1 Greenleaf on Evidence, Sec. 27, p. 122 (16th Ed.).

It has uniformly been so held in suits on the plaintiff's bond where, under the statute, he fixes the value.

"And the court further held, that the party who made the bond, and fixed the value, might well be bound by it, as was decided in *Gordon vs. Jenney*, 16 Mass 465, and that it did not follow that the other party, who had no agency in fixing the amount, should be concluded by it, because the property had risen in value. * * * The only mode, therefore, to give the plaintiff the indemnity to which he is entitled, is, to take the estimate of the value as set out in the replevin bond."

Parker vs. Simonds, 8 Met. 205, 212.

Kafer vs. Harlow, 5 Allen 348.

Leighton vs. Brown, 98 Mass. 515.

"When it is considered that the plaintiff in re-

plevin sets his own value upon the goods, and takes them out of the possession of a person *prima facie* entitled to the custody of them, and undertakes to prove a title in himself, which he subsequently fails to do, there seems to be no hardship in holding him to the value fixed in his writ. * * * This implies that the plaintiff in replevin is bound by his valuation. * * * We are of opinion, therefore, that in an action on a replevin bond, the valuation in the writ of replevin, as a general rule, is to be considered the value of the property."

Huggeford vs. Ford, 11 Pick. 222, 223.

Swift vs. Barnes, 16 Pick. 194.

"Such a rule, if law, is in accordance with justice and reason. The allegation of value in the affidavit of the plaintiff is solemnly made and sworn to. The writ is under its control. It was placed in the sheriff's hands by its procurement. The issuance and service was caused by it as the actor, and the sheriff, in every instance, acted for the company. The bond of the plaintiff and sureties taken by the sheriff in double the value of the property fixed by the plaintiff, is a judicial admission and a conclusive presumption of law. See 2 Sedg. Dam. (7th Ed.), p. 431. To hold the plaintiff and his sureties bound thereby is a rule of protection for the general good. The same principle is applied in England. *Middleton vs. Bryan*, 3 Maule & S. 155. * * * The statute requires that the plaintiff, or some one else on his behalf, shall give to the sheriff, etc., a bond with sufficient security in double the value of the property about to be replevied. The plaintiff prepares the bond required by the statute, and in order to comply therewith estimates the value, and gives a bond in double the amount thereof. Such act estops the principal and sureties from denying the truth of the admission."

Vulcan Iron Works vs. Cyclone Steam Snow Plow Co., 48 Fed. 652.

This is in effect a forthcoming bond and is conclusive against the assertion of larger amount.

Smith vs. Packard, 98 Fed. 793, 800.

"The statement as to the value of the property, made in the affidavit at a time when the plaintiff is seeking to obtain possession, must be regarded as estopping him from asserting a different value. After fixing it at such a time, plaintiff should not be heard to complain of the value so fixed by him, save in exceptional cases. Wells Repl., Secs. 569, 660, and cases cited. The presumption is that the defendant relies and acts on the statement as to value in subsequent proceedings,—such, for instance, as when he determines whether he shall avail himself of the privilege of rebonding and retaining possession. As remarked by Mr. Wells, the enforcement of the rule is calculated to promote a fair and reasonable estimate of value in the bond and affidavit by the party seeking to obtain possession."

Weyerhauser vs. Foster, 60 Minn. 223, 224;
61 N. W. 1129.

"The plaintiff in the replevin suit, in his affidavit, swore that the piano was of the value of \$400. The bond was read in evidence, and, in our opinion, sufficiently established the value of the piano. The recital in the bond, that the piano was of the value of \$400, was a solemn admission of the appellants, and which, in an action upon the bond, would estop them from denying the truth of the admission."

Wiseman et al. vs. Lynn, 39 Ind. 250, 259.

"When a party makes an admission in any instrument under his hand and seal, he is estopped from disputing the facts which it recites."

Trimble vs. The State, 4 Blackf. 435, 437
(Ind.).

"It will be remembered that the complaint in the replevin action alleged that the property was of that value, and that the undertaking executed to secure the possession of the property contained the same recital. Such averment was binding upon Mrs. Learned and estopped her from contradicting the value she placed thereon."

Capital Lumbering Co. vs. Learned, 36 Ore. 544, 548; 59 Pac. 454.

"The plaintiffs having sworn in their affidavit upon which the writ of replevin was issued that the property was worth \$1,000, and having distinctly alleged the same fact in the declaration, it would have been competent for the court to have instructed the jury that that fact was admitted. This, however, was not done directly, but the same result was reached by permitting defendant to read the affidavit to the jury, and refusing to allow plaintiffs to introduce evidence tending to prove their own solemn statements to be false. There was no error in this. 1 Greenl. Ev., Sec. 27."

Butts vs. Woods, 14 N. M. 187; 16 Pac. 617, 618.

"When the value of property is to be assessed, the statement in the affidavit of the plaintiff as to the value is frequently regarded as estopping him from asserting a different value. After fixing the value at a time when he was seeking the delivery of the property on the writ, he should not be heard to complain of the value so fixed by himself; but the defendant, who is in no way concerned in so fixing the value, is, of course, not affected by it. * * * The enforcement of this rule is calculated to promote a fair and reasonable estimate, in his affidavit, by the party seeking the delivery."

Wells on Replevin, Sec. 569, pp. 310, 311; Sec. 660, p. 360.

"But with the defendant in replevin it is otherwise. As he has no hand in fixing the value of the writ, he is not estopped from showing it to be greater than is there stated. *Thomas vs. Spofford*, 46 Me. 408."

Tuck vs. Moses, 58 Me. 461, 477.

"The plaintiff in replevin, who fixed the value of the property as stated in the bond, is bound by that value, * * * but the defendant in replevin had no concern in fixing the value, and is not bound by any of the recitals in the bond."

Wells on Replevin, Sec. 453, pp. 251, 252.

We have stated these cases at great length because there seems to be some confusion in the mind of the plaintiff, and in courts as well, as to the true rule. An examination, however, makes it easy to deduce a rule, founded in reason and in perfect harmony with the underlying principles on which these decisions rest. The case of the Washington Ice Co. (125 U. S. 426), upon which the plaintiff offered to rest its case in the court below, illustrates this. There the court held that the sureties of the plaintiff, who had described the property and fixed the value at \$15,000, were bound by a judgment of \$20,069.33, citing the Massachusetts cases, as well as those from Maine, in which jurisdiction the case arose, to the effect that "the plaintiff in replevin is bound by the value which he puts upon the property in his writ; but with the defendant in replevin this is otherwise, and as he has no hand in fixing the value in the writ he is not estopped from showing it to be greater than is there stated," and that the sureties of the plaintiff

"in the replevin bond were represented in the replevin suit by the plaintiff therein and were identified with it in interest and claimed in privity with it, so as to be concluded by the proceedings in that suit." The conclusion is irresistible that the plaintiff, who fixes the amount, and his sureties are concluded. The defendant, who had no hand in fixing the amount, and his sureties are not concluded. Therefore, in this action the plaintiff was concluded as to these sureties that the amount did not exceed \$15,000, as it had fixed it, and when it changed the value and procured a judgment on a different value the sureties were discharged, since the plaintiff was estopped from claiming any value in excess of \$15,000.

(f)

The better rule is that any increase in the pecuniary obligation, without assent, discharges the surety.

This is the ground upon which the Supreme Court of Hawaii rests the case,—that it was a variation of the risk, which was "to be responsible for the return of property of a specified value, or, in default thereof, for the payment of a judgment for its value, together with damages, interest and costs." The increase in the allegation of value increased this risk by \$7,000, and thus discharged the sureties.

Not losing sight of the distinction in this case that the value sworn to in the affidavit is the founda-

tion of the proceeding and one of the terms of the bond, and that the change in value is not merely an increase in *ad damnum*, we submit that, in reason and in authority, the rule is that an increase in the value, for which the surety is liable, discharges the surety, unless the surety has contracted in some form to assume the increased risk; as in *United States vs. Powell*, *ubi supra*, or in the Massachusetts cases, where the law contemplates that he shall have an opportunity to be heard on the question whether the change increased the risk. *Driscoll vs. Holt*, 170 Mass. 262; 49 N. E. 308. And this, although the change is made by judicial authority in a proceeding in which the bond is given.

Sage vs. Strong, 40 Wis. 575.

Tyler Mining Co. vs. Last Chance Min. Co.,
90 Fed. 15.

In Maine it has been repeatedly held that an increase even of the *ad damnum* of a writ discharges the sureties on an appeal bond.

Langley vs. Adams, 40 Me. 125.

Moss vs. Sleeper, 58 Me. 331.

Ruggles vs. Berry, 76 Me. 262.

In Massachusetts, also, the court has said:

"We think that after an attachment, or holding to bail, the plaintiff cannot alter his writ to the injury of * * * bail * * * bail are not to be made liable for a greater sum than was included in the writ at the time when they entered into the bail bond."

Willis vs. Crooker, 1 Pick 203, 205.

The cases which are cited contra are largely dicta, not well reasoned, and not upon the exact point.

(g)

The sureties' liability arises in the ancillary proceeding, is conditioned on plaintiff's affidavit of value, and therefore their liability is not affected by proceedings in the principal action which do not change the value in the affidavit—the foundation of their liability—and any judgment that is obtained in the principal action is not binding on them, for the plaintiff has elected to proceed in the principal action without further claim to the immediate possession of the property.

In our view, this is the true solution of this point, as we shall show under the next head. The consideration of the sureties' obligation is the right of the plaintiff to take possession of the property, and that right is based, under Sec. 2102, upon an affidavit in which the actual value of the property is sworn to be \$15,000. The same allegation appears in paragraphs 6 and 14 of its verified complaint, in the original action, and in the complaint in the present action. It gave, under Sec. 2104, its bond to the sheriff "in double the value of the property as stated in the affidavit," viz., \$30,000, and the notice, bond and affidavit, all showing the value to be \$15,000, were served on Hutchins. On the faith of this, Hutchins procured the sureties to enter into their

obligation, under Sec. 2112, in double the value of the property as stated in the affidavit, viz., \$30,000, reciting, as the condition of the obligation, that the property "was of the value of \$15,000 as stated in the affidavit filed therein."

The affidavit is thus the foundation of the ancillary proceeding, and, with the bond, gives the right to immediate possession—the consideration for the sureties' obligation,—and all subsequent proceedings started by it are based on the actual value so stated, including the damages, to which the surety must respond. When, therefore, the plaintiff increased the valuation by \$7,000, substantially half as much again as the actual value stated in the affidavit by which it procured the sureties' bond, and leaves the proceeding by which he is entitled to immediate possession, viz., the affidavit and his own undertaking, unchanged, the plaintiff has elected to proceed in the original action without further claim to the immediate possession of the property, as he has a right to proceed, and the surety is released from the obligation to return property to which the plaintiff is not entitled and is not bound by any judgment thereafter rendered. This is peculiarly so, since the value stated in the complaint is no longer the actual value, which the statute requires to be stated in the affidavit, with reference to which he contracted, and is no longer that actual value with reference to which the plaintiff gave the bond which entitled him to the possession. Any other construction of the statute would render the re-

quirement to state the actual value meaningless, and would be a trap to the surety.

The stronger reason is, as we shall show under the next head, that there is no longer any consideration for the sureties' obligation. It has failed; since there is no longer any affidavit showing the actual value, and no longer any undertaking on the part of the plaintiff in double that value, as provided by statute.

(h)

The plaintiff's right to take possession of the property before judgment, being dependent on an affidavit of the actual value and a bond in double that amount, failed when the amendment was made, and, with this, the consideration of the agreement of the surety failed, viz., the prevention of the delivery of the property to the plaintiff, which was no longer entitled to it.

Plaintiff's right to the possession of the property before judgment is conditioned upon an affidavit of actual value and his giving bond, with sureties, in double that value. The consideration upon which the redelivery bond stands is that it defeats the right of the plaintiff to take possession.

When the defendant amended his complaint and took judgment on it, he was no longer entitled to the possession of the property pending the action, since he had made no affidavit of its actual value,

nor given any bond in double that value. The consideration of the sureties' obligation failed, since the plaintiff was no longer entitled to the possession of the property, and they cannot be held. The purpose of filing the affidavit describing the property in detail and giving its actual value is that the court and all the parties may see its character and value, and the undertaking of the plaintiff is in double the value so fixed. The plaintiff fixes its own valuation and incurs this obligation in order to procure the possession. The defendant cannot increase the valuation. It can only protect itself by rebonding on plaintiff's valuation if it has set the value too low. In this case the plaintiff could have set the value at \$500 and given a bond for \$1,000; but the defendant could have given a redelivery bond in the same figure. Amending its complaint, increasing the valuation by \$7,000, without amending the affidavit or giving a new undertaking, it no longer, within the terms of the statute, is entitled to claim the possession of the property during the pendency of the litigation; for it has filed no affidavit showing the actual value of the property at the increased rate, nor has it given bond to the defendant in double that value. Not being entitled to the possession of the property, the consideration of the contract of the surety to prevent its delivery to the plaintiff has failed, and they are not obliged to return it to him, since he was not entitled to take it originally. The plaintiff had a right under Section 1738, to amend as against Hutchins in the principal action; but

when it amended against Hutchins without affidavit and without bond on its part, it had no further right to the possession, the ancillary proceedings fell, and the sureties were no longer liable. Any other construction would lead to the encouragement of perjury and deception. In this case, the parties being at issue, the plaintiff would, in order to get possession of the property, probably have to dismiss its action and begin again, with a new affidavit and bond.

(i)

The construction put upon the local statute by the local court should be persuasive, if not controlling, in this court.

The contention of plaintiff before the Hawaiian Court was that the words in the statute (Sec. 2112) "for any cause" included any judgment which might be rendered, including an alternative judgment for value, although for a different value than that alleged in the original affidavit and proceeding, and it contended that the amount of the bond, being double the value, was so made to cover any mistake which may have been originally made in estimating the value. Our contention was that the words "for any cause" were inserted in the statute to cover the judgment for damages and costs in addition to the recovery of the property or its value as specified, and the Hawaiian Court has sustained our contention, saying:

"The responsibility for 'such sum as may for any cause be recovered against the defendant' evidently refers to recovery upon the action recited. *The Oregon*, 158 U. S. 186, 206. The risk in this case was to be responsible for the return of property, of a specified value, or in default thereof for the payment of a judgment for its value, together with damages, interest and costs. The penal sum of the bond, \$30,000, was the limit of the risk, not the risk itself. The subsequent amendments were not the exercise of a judicial power for which neither party was responsible, but the voluntary act of the obligee, the allowance by the court being formal and largely controlled by statute. R. L., Sec. 1738. By these amendments, in this case made after the death of the surety whose estate is now sought to be charged, the plaintiff increased the risk of the sureties nearly fifty per cent., and actually obtained a judgment for \$22,000 with damages and costs. We are of the opinion that this increase of liability was outside the contract of the sureties and that they are discharged."

Bierce vs. Waterhouse, 19 Haw. 398, 408.

We contend that this is a judicial construction by the Hawaiian Court of a Territorial statute which should be persuasive, if not controlling, with this court.

Kealoha vs. Castle, 210 U. S. 149, 153.

Kawananakoa vs. Polyblank, 205 U. S. 349.

Copper Queen Mining Co. vs. Arizona, 206 U. S. 474.

II.

THE SURETIES CANNOT BE HELD UNDER
A SUBSEQUENT AMENDMENT OF THE OR-
GANIC ACT GRANTING AN APPEAL TO THIS
COURT.

On January 28, 1905, the Supreme Court of Hawaii rendered its opinion; which was admitted by the plaintiff to be decisive in favor of the defendant Hutchins, and under which these sureties would have been discharged from all liability. On March 3, 1905, Congress amended the Organic Act in reference to appeals by adding a provision: "In all cases where the amount involved, exclusive of costs, exceeds the sum or value of \$5,000."

The petition for rehearing pending in the Supreme Court would not have authorized an appeal, although acted on after March 3rd.

Harrison vs. Magoon, 205 U. S. 501.

It was well said in that case by Mr. Justice Holmes:

"A party cannot evoke a new one by filing a petition for rehearing, even if, by accident, it is kept along until an act giving an appeal is passed."

The alleged judgment of the Supreme Court of Hawaii, entered, in effect, *ex parte*, is without authority of law.

Meheula vs. Pioneer Mill Co., 17 Haw. 91.

Cotton vs. Hawaii, 211 U. S. 162.

And such seems to be the view taken by this court.

Hutchins vs. Bierce, 211 U. S. 429.

Bierce vs. Waterhouse, 19 Haw. 594.

And yet under this void judgment, without any right of appeal to this court, these defendants are charged not only with the result of that appeal, in reference to which they never contracted, but also with a large bill of costs arising under it. The grounds on which they are discharged are:

(a)

All the proceedings subsequent to the denial of the petition for rehearing are coram non judice.

"We are of the opinion that this court can take no other action on overruling the exceptions than to authorize the usual remittitur."

"This court has by law no power in overruling exceptions to make a judgment in the case tried in the circuit court, and such judgment is not required 'for the promotion of justice in matters pending before it,' for nothing is pending."

Meheula vs. Pioneer Mill Co, ubi supra.

The court in that case refused to assume the power which it did not have to enter a final judgment in order to authorize an appeal.

This case has been cited with approval in this very action, this court saying, in its opinion delivered December 14, 1908, dismissing the appeal of the plaintiff in the original action and holding that

there was no appeal from a judgment on exceptions to the Supreme Court of the United States:

“It may be that in its present opinion the former judgment was unwarranted in point of procedure. (*Meheula vs. Pioneer Mill Co.*, 17 Haw. 91.)”

We respectfully submit that if the judgment entered by this court, from which the first appeal was taken, was unwarranted, as it was not asked for nor assented to by the appellant, which at the time of its granting counsel refused to recognize, and not properly within the jurisdiction of this court, it can have no effect on the surety, even if on the principal, and that the subsequent proceedings of this court purporting to be under the mandate of the Supreme Court of the United States can have no effect upon him; for, even if his principals could waive the question of jurisdiction, it could not be waived as to the surety, and he is released by submitting the cause to a tribunal without jurisdiction, in the same way that he would be released by its being submitted to arbitration.

Even if the sureties' principal could waive the question of jurisdiction in the Supreme Court of the United States, it could not be waived as to the surety.

Oskosh Water Works Co. vs. Oshkosh, 106 Wis. 83; 81 N. W. 1040.

“The liability of a surety is *strictissimi juris*, and cannot be extended by implication. He has a right to stand on the exact words of his contract. * * *

The deviation from the statutory requirement is one of substance. The surety may have been quite willing to enter into the engagement to pay the costs, if the appellant should be defeated on a trial in Eau Claire county, in the city where the alleged cause of action arose, and quite unwilling to undertake for the payment of costs, in like event, of a trial in a distant county, greatly increased by the travel of witnesses and the costs of subpoenaing them. A similar ruling in *Myres vs. Parker*, 6 Ohio St. 502-504, sustains the conclusion at which we have arrived, that the bond under consideration is not a substantial compliance with the statute." *Drinkwine vs. Eau Claire*, 83 Wis. 428; 53 N. W. 673.

Oshkosh Waterworks Co. vs. Oshkosh, 187 U. S. 437.

Nor can it be said that the surety can be held by the subsequent proceedings in the Supreme Court of Hawaii and in the Circuit Court, for these were taken in pursuance of a void appeal and long after the term at which the judgment had been rendered had expired.

(b)

If the amendment to the Organic Act applied, then the granting of the new right of appeal to another jurisdiction extended the liability of the surety, exposed him to the judgment of a court, with reference to which he did not contract, and imposed upon him a new pecuniary obligation, viz., the costs of that court.

We have already shown that the existing laws enter into and become a part of the contract of the

sureties. In this case, had no new right of appeal been given, the surety would have been discharged. We cite, however, additional cases to the point that the obligation depends on the law as it stood when the contract was made, and that the legislature cannot subsequently require the performance of further conditions or increase the liability of the sureties thereby.

City of Lafayette vs. James, 92 Ind. 240.

Bryson vs. McCrary, 102 Ind. 1; 1 N. E. 55.

The remedy cannot be altered so as to increase the obligation of the surety.

Rights cannot be impaired by acting on the remedy any more than on the contract itself.

Pritchard vs. Norton, 106 U. S. 124.

Green vs. Biddle. 8 Wheat. 1.

Bronson vs. Kinzie, *ubi supra*.

Under this rule, stay laws have been held to impair contract rights.

Aycock vs. Martin, 37 Ga. 124; 92 Am. Dec. 64.

So repealing the right to levy a tax for the payment of bonds.

Von Hoffman vs. Quincy, *ubi supra*.

Seibert vs. Lewis, 122 U. S. 284.

Shapleigh vs. San Angelo, 167 U. S. 646.

So of taxation to satisfy judgments.

Butz vs. Muscatine, 8 Wall. 583.

Nor can the place of payment be changed.

Dillingham vs. Hook, 32 Kas. 189; 4 Pac. 168.

So of the obligation to receive coupons for taxes.

McGahey vs. Virginia, 135 U. S. 693.

So of laws affecting judgments and executions.

Christmas vs. Russell, 5 Wall. 290.

Daniels vs. Tearney, 102 U. S. 419.

A power of sale mortgage cannot be affected by changing the right of redemption or the power of sale.

Barnitz vs. Beverly, *ubi supra* .

Clark vs. Reyburn, 8 Wall. 332.

Brine vs. Insurance Co., 96 U. S. 627.

It is not a question of degree, or manner, or cause, but an encroachment in any respect on its obligation dispensing with any part of its force.

Planters' Bank vs. Sharp, 6 How. 301.

Phinney vs. Phinney, 81 Me. 450.

Many of these cases arise under a constitutional provision, but the rule of construction is the same. The contract is construed in accordance with the Constitution. The contract of these sureties should be interpreted in the light of the existing law.

"The security had a right to look to the provisions of this statute, and to calculate his liability."

The People vs. Jansen, 7 Johns. 332.

These cases deal with the impairment of a contract by diminishing its value. The rule is the same when the obligation is increased. Thus, a Missouri case declares that if authority is wanting in the legislature to pass such a law, the court should be loth to put a construction on the law adverse to its policy; and adds:

“When the surety in this case executed the bond by which he is bound, the liability thus incurred was fixed and ascertained by law. Can the Legislature, then, by a subsequent act, say that this liability shall be increased? The existence of such a power in the general assembly cannot be maintained in our form of government.”

McCurdy vs. Brown, 8 Mo. 550.

In a case where by a subsequent statute the case was transferred to the Supreme Court, instead of to the Court of Appeals (*Schuster vs. Weiss*, 114 Mo. 158; 19 L. R. A. 182; 21 S. W. 438), it was held that the act of the Legislature imported new conditions into the bond, and refers to *Re Garesche*, 85 Mo. 469, in which they had decided that this could be done as to the suitor but not as to the sureties, for,

“While the Legislature deprived the suitor of a hearing in the court of appeals, it at the same time secured him a hearing in the court of last resort in the state. But it is altogether a different proposition as to his sureties. They are not parties to the suit. They are obligors in a collateral undertaking. They entered into a private contract with Mrs. Schuster, and agreed to be bound on certain conditions. Over their contract was the protection of the Constitution. That contract was made with

reference to the law as it then stood. In the light of that law it must be read."

And again:

"The bond was drawn with reference to the form of procedure subsisting at the time. They could not anticipate a different mode."

The learned judge cites with approval *State vs. Roberts*, 68 Mo. 234:

"A change in the law by which the time for the annual settlement of county collectors is fixed a month later than that provided in the law when the bonds of the collectors were given operated to discharge the sureties."

This case quotes with approval the opinion of Sherwood, J., in an earlier case, in which it was held that a bond given under a statute not contemplating an appeal to the Supreme Court, but to the Court of Appeals, did not bind the sureties to a judgment rendered in pursuance of a mandate of the Supreme Court. (*Nofsinger vs. Hartnett*, 84 Mo. 549.)

"The failure of the court of appeals to render judgment on the appeal, and the transfer to this court, extended the time of defendant's liability on the appeal bond. * * * To say, under such circumstances, this transfer had not increased their peril, would be to shut our eyes, and refuse to see the result. The variance is so clear, and its consequences so manifestly hurtful to defendants, it operated to discharge them, in law and equity, from all further responsibility on this bond. * * * That contract was made with reference to the law

as it then stood. In the light of that law it must be read. After it was made, it was secure from any act of the Legislature, or amendment to the Constitution, impairing its obligations. * * * 'It is perfectly clear that any law which enlarges, abridges, or in any manner changes, the intention of the parties resulting from the stipulations in the contract, necessarily impairs it.' " (*Ogden vs. Saunders*, 12 Wheat. 256.)

Nofsinger vs. Hartnett, 84 Mo. 549.

The learned judge also says that the surety might well be willing to submit to one appeal, but not to a series of appeals; eminently applicable to this case, in view of its result. This case is followed in *Brookshier vs. McIlcrath*, 112 Mo. App. 687; 87 S. W. 607.

An injunction bond is construed with reference to the statute in force. A statute passed but not in effect does not become a part of the contract. The latter statute authorized the court to assess damages subsequent to the dissolution; while the earlier statute only covered damages awarded upon the dissolution.

"This cannot be done. It would do more than to affect the remedy. It would affect the obligation of the contract by creating a liability where none at the time existed."

Mix. vs. Vail, 86 Ill. 40.

See also:

Alwood vs. Mansfield, 81 Ill. 314.

Lapsley vs. Brasears, 4 Litt. (Ky.) 46.

Blair vs. Williams, 4 Litt. (Ky.) 34.

But it is otherwise as to an existing law, "because the law was in existence at the time of the contract, with reference to which the parties must be supposed to have contracted, and is a part of the bond."

Haldeman vs. Powers, 103 Ky. 525; 45 S. W. 662.

Aeusch vs. Demass, 34 Mich. 95.

In an Indiana case decided on circuit, Mr. Justice McLean held that the surety under a replevin bond to respond to a judgment was entitled to have the lands sold under the law in force at the date of the bond, and not under a subsequent law, that learned judge saying:

"This being a statutory bond, the liability under it must be enforced conformable to the laws then in force."

Stockwell vs. Kemp, 4 McLean 80; 23 Fed. Cas. 115.

In Virginia, sureties are not bound by a subsequent act allowing damages on an affirmance of a decree in chancery.

Woodson vs. Johns (Mumf.), 18 Va. 230.

This case has been cited with approval in both Virginia and West Virginia.

Jeter vs. Langhorne, 5 Gratt. 193.

Bailey vs. McCormick, 22 W. Va. 95.

A surety might be willing to assume the responsibility of one appeal, but be "wholly unwilling to

be bound to await the end of the decision in the Supreme Court."

Winston vs. Reeves, 4 Stewart & Porter 269 (Ala.).

III.

THE SURETIES CANNOT BE HELD UNDER THE ACT OF 1903, CHAPTER 32, SECTIONS 17, 18, AND 19 (REVISED LAWS, 1905, SECTIONS 1861, 1864, AND 1865), SINCE THAT DID NOT GO INTO FORCE UNTIL AFTER THE EXECUTION OF THE BOND.

(a)

If the act applies to this action, instituted ~~upon~~^{upon} its passage, the passage of the act discharged the surety, since it required the surety to return at a different time than he would be required under the existing law.

A statute passed but not in effect cannot have any effect on the bond.

Mix vs. Vail, ubi supra.

We cite also to this point all the authorities cited under II (b).

(b)

The Act of 1903 does not apply to this case, and

therefore the action was prematurely brought and the executors cannot be held.

This action was brought whilst an appeal was pending, which stayed the proceedings but for the power given by the statute of 1903 for the court to order the enforcement of the judgment. Under the existing law the court could not require security. The new law went into effect August 1. Therefore, the surety's contract was under the old law, and he was not liable to respond to the judgment until the disposal of the appeal; but, whether this be true or not, there is no provision of law authorizing the court to require any further redelivery bond from the defendant and no rule of court giving such power. Nor is this a money judgment; and therefore the order requiring the bond is void. Moreover, the authority of the statute is to make the order on good cause shown, and the good cause shown was that the defendant had failed to file a new redelivery bond, which was not a good cause, as the court had not the authority to make the order.

IV.

THE ACTION WAS PREMATURELY BROUGHT AGAINST THE EXECUTORS; THE CLAIM BEING STILL IN THEIR HANDS FOR CONSIDERATION, NOT HAVING BEEN REJECTED.

The statute provides (Sec. 1851) a notice to all creditors to present their claims within six months from the day of publication; or, in the event of non-presentation, they shall be forever barred, and the executor not authorized to pay.

Sections 1853 and 1854 are as follows:

SEC. 1853. SUITS ON REJECTED CLAIMS, COMMENCED WHEN. If any claim be rejected by the executor or administrator, he shall give written notice of such rejection to the creditor, and suit must be brought upon it against the executor or administrator within two months after such notice is given, or within two months after the same becomes due, or it will be forever barred.

SEC. 1854. OTHER SUITS, COMMENCED WHEN. Executors and administrators shall in no case be liable to suit until the expiration of six calendar months after probate, or the granting of letters of administration, except in cases of rejected claims as provided in Section 1853.

The claim of September 6th, which was rejected September 26th, was abandoned because of its de-

fective presentation of claim. This is shown by the new claim of September 30th, by the letter of the attorneys for Bierce to the executors accompanying the claim (Tr. p. 159), in which they say that they are correcting the old claim by "putting in a new claim in place of the old one," and earnestly request for prompt action of acceptance or rejection. The testimony in this case shows that this claim was under consideration by the executors, the executor in Hawaii desiring to consult his attorneys and his co-executor, and that, if it was rejected, it was long after the beginning of the suit October 11, 1904 (Tr. pp. 331-338).

The plaintiff in the court below claimed that it was not necessary to wait for the rejection of the claim, and that, for some reason not made clear, the imperfect and rejected claim satisfied the statute.

The Hawaiian Court has said, in a case where a judgment creditor presented a claim, which was allowed, that it was inconsistent for him to attempt to press the judgment:

"This assertion of claim precluded the judgment creditor from afterwards assuming an inconsistent position to the prejudice of the executrix."

Ching Tam Shee vs. Oriental Life Ins. Co.,
19 Haw. 663, 666.

The presentation of the second claim precluded plaintiff from afterwards asserting a right to sue on the first claim.

Upon the second point, that no rejection is neces-

sary, the statute itself would seem to be clear. The executor is obliged to give written notice of the rejection, and suit is to be brought within two months thereafter. Section 1854 refers to "other suits" than suits on rejected claims, which are specifically excepted from the section.

The claim of September 30, 1904, was still in the hands of Albert Waterhouse. He desired to consult his co-executor—his uncle, William Waterhouse,—who resided and was at that time in Pasadena, California, before acting on the claim. On October 11, 1904, the plaintiff brought suit, without waiting for any action by the defendants. Neither does it appear that plaintiff made any inquiry as to what action the executors intended to take. The Hawaiian statute, Section 1853, provides for suit within two months after notice of rejection, "or within two months after the same becomes due." Plaintiff in this case brought suit for rejection. The executor, Albert Waterhouse, was entitled to reasonable time to consider the claim, and suit brought on October 11, 1904, on a claim presented September 30, 1904, is premature.

Or, taking another view of the statute, the plaintiff could sue within two months *after* the claim became *due*. The claim was not due while there was an appeal pending in the replevin suit. That very appeal in the replevin suit resulted in the judgment being reversed by the Supreme Court of the Territory.

That the case was prematurely brought against

the executors on the claim is supported by the following authorities:

Ellsworth vs. Thayer, 4 Pick. 121.

Goff vs. Kellogg, 18 Pick. 256.

Espy vs. Conner, 76 Ala. 501.

Hentsch vs. Porter, 10 Cal. 555.

Keenan vs. Saxton, Admrs., 13 Ohio 41.

Dredla vs. Baache, 60 Neb. 655; 83 N. W. 916.

Fulton vs. Black, 21 Tex. 424.

Walters vs. Prestidge, 30 Tex. 66, 71.

Even if the plaintiff was obliged to bring its action before the final determination of the replevin suit on the appeal (*Corn Exchange Bank vs. Blye*, 102 N. Y. 305; 7 N. E. 49), it was entitled to a distinct rejection before the statute of limitations began, and, on the other hand, it could not subject the executors to cost before such a distinct rejection or at least an unreasonable delay.

“Executors and administrators are entitled to a reasonable time for the examination of claims and accounts against the estate before endorsing thereon their allowance or rejection.”

18 Cyc. 503.

“Justice to the claimant, as well as the reasonable interpretation of the statute, requires that the act of the executor or administrator, in disputing or rejecting the claim which is to put the claimant to an action within the brief period prescribed, upon pain of forfeiting his claim, should not be ambiguous or equivocal, capable of two interpretations,

but decided, unequivocal and absolute; such an act or declaration as will admit of no reasonable doubt that the claim is definitely disputed or rejected, so that the claimant will be without excuse for not resorting to his action within the time required to save his claim. To construe and apply the statute in a manner more liberal to the representatives of estates would make it a trap and a snare to claimants. They might be misled and induced to remain passive until they had lost the right of action by a notice or a declaration so carefully drawn or made as to lull them to rest; while it might be claimed that an intention to dispute or reject the claim was clearly inferable from the language used. The rule is as fairly deducible from the authorities and the statute upon a reasonable interpretation, that whatever may be the language or declaration of the executor or administrator to the claimant, if in the same notice or declaration or at the same time he does or says anything from which the claimant may reasonably infer that the determination to dispute or reject the claim is not final, but that it will be further examined or considered, either upon the vouchers already exhibited or such as may be thereafter presented, the claim is not 'disputed or rejected' within the statute. *Kidd vs. Chapman*, 2 Barb. Ch. 414; *Reynolds vs. Collin*, 3 Hill 36; *Elliot vs. Cronk's Admrs.*, 13 Wend. 35; *Barsalou vs. Wright*, 4 Bradf. 164."

Hoyt vs. Bonnett, 50 N. Y. 538, 543.

V.

THE RETURN OF THE PROPERTY SATISFIED THE OBLIGATION OF THE BOND; OR, IF NOT SUFFICIENT TO SATISFY THE BOND, THE OFFER TO RETURN, COUPLED WITH THE FAILURE EITHER TO ACCEPT OR REJECT THE PROFFERED RETURN FOR FORTY DAYS, DISCHARGED THE SURETY.

(a)

The evidence in this case shows a return of the property to the plaintiff, which was in control of it, through the Kapiolani Estate, for more than a month. It cannot afterwards change its policy and hold the surety on the bond. The evidence is contradicted.

Hutchins tendered the property back. The only qualification which he made was that he reserved the right to appeal. This he clearly had a right to reserve. The plaintiff, pending the litigation, could only claim the right to possession under its bond, and the defendant recovered possession by the re-delivery bond.

“The property in dispute may be said to be in the meantime in the custody of the law. That is to say, it is represented by the bond, which imports that it

is held by the plaintiff to abide the event of the suit, and to be disposed of accordingly."

Stevens vs. Tuite, 104 Mass. 328, 332.

"The bond stands in place of the property."

Leonard vs. Whitney, 109 Mass. 265.

Walko vs. Walko, 64 Conn. 74; 29 Atl. 243.

Therefore, the suit not being ended, the obligation of the defendant, in case there was no stay, was not to deliver the property absolutely, but to deliver the property to the plaintiff to be held under the bond and to abide the ultimate result of the suit. He had at least a reasonable ground for appeal, since the Hawaiian court sustained it. Nor did the plaintiff at that time object to the reservation of the right of appeal. It cannot now set up reasons which it did not at the time.

Am. & Eng. Enc. of Law, Vol. 28, pp. 34, 38, 40.

Dresel vs. Jordan, 104 Mass. 407.

The uncontradicted evidence shows:

(a) The property was at all times upon the premises (Tr. p. 627).

(b) Hutchins tendered the property and did everything which the plaintiff required (Tr. pp. 152, 386, 390).

(c) The plaintiff accepted tender conditioned on getting actual possession, and agreed to notify at once if it could not secure this (Tr. pp. 153, 154).

(d) It had already given options on the property, and upon the next day after the return completed an option with the Kapiolani Estate, Limited, by which it was to retain the property in its possession on the ground for thirty days from that date (Tr. pp. 160, 161).

(e) The Kapiolani Estate, with whom other negotiations were had, to the character of which, viz., a release of all claims was executed (Tr. pp. 486, 509, 171), did so retain it in its possession as it lay.

(f) Hutchins, as requested by the plaintiff, did not thereafter interfere with the property (Tr. p. 386).

(g) The plaintiff offered on April 26th to sell the property to Hutchins, taking delivery as it lay, at any time within thirty days, subject to the option to the Kapiolani Estate, Limited, thus giving Hutchins notice of that option (Tr. p. 141).

(h) The plaintiff admitted, on May 16th, that the matter of the redelivery had not received from it appropriate attention, still claimed that the property had been tendered and accepted conditionally upon the actual delivery, and asked for the leases in order to determine what right Hutchins had to *maintain* the railroad (Tr. pp. 154, 155).

(i) Forty days after the tender, the Kapiolani Estate option having expired, the plaintiff, having

changed its policy in regard to recovering the property, for the first time gave notice that it was unable to get possession, assigning as a reason that the land owners absolutely refused to allow the removal of the rails (Tr. p. 157).

(j) This was absolutely false, and Hutchins, upon receiving this notice, denied the good faith of plaintiff in making the claim, and insisted that he had long since turned over the property precisely as he had received it (Tr. pp. 157, 158, 506, 638, 639, 440).

(k) Hutchins' agent on the ground gave notice in writing May 23rd that the property had been returned, the judgment paid, that Hutchins had exercised no right or control since the return, and asked that the least possible damage should be done in removing it (Tr. pp. 158, 159, 385, 416, 417, 493).

(l) There had been a change of policy in regard to taking possession, and the plaintiff was no longer desirous of taking possession (Tr. pp. 494, 495, 496).

No argument or authority can add to this statement of uncontradicted facts.

(b)

The offer to return discharged the sureties.

The only ground on which the plaintiff could refuse the tender would be that it was not getting what it was entitled to. But here the property was

tendered in the same condition as it was received. Nor was there any objection to the form or manner of the tender. The plaintiff was bound to state its objections, and the only objection which it made was that it should be an actual delivery. There is not a particle of proof in this case that it could not have had an actual delivery. The property was in the possession of the Kapiolani Estate, to whom plaintiff had entrusted it, and which was estopped to deny the Bierce ownership during the thirty days, and during that thirty days the plaintiff could have taken away the property if it had wanted to but for its option with the Kapiolani Estate. But it is incumbent on the plaintiff to show, having accepted the tender, that it could not secure an actual delivery.

Hutchins, as he was requested, did not interfere. The alleged statements by Scott are denied by him, and no proof offered in support of the allegation. The reason offered for not taking possession was that "the land owners absolutely refuse to allow us to remove the rails in question," and there is not a particle of proof that any land owners refused. None of the rails were on Paris' land. Scott denies having made any objection, and the only objection shown is to taking off the rails from Paris' land. It is true that Cooper testifies, on his original examination, that the result of the conversation with Colburn was "that he wouldn't deliver the property; I can't do it better than that" (Tr. p. 465). On cross-

examination, he recalls the conversation (Tr. p. 488):

A. I think he said something about "You might try to roll the engine," something of that kind; some remark of that kind.

Q. Then he didn't make any objection to your taking off the rolling-stock?

A. Well, he spoke in that way. I don't—I don't remember it as being a permission to take the stock off the property, off the premises.

Q. Well, was it a refusal to let you take off the rolling-stock?

A. I understood his—the result of his conversation would mean a refusal to let me take the property.

Q. Can you remember anything further than the impression that it left on your mind?

A. I think he might have said, "Well, you might try and roll the stock off, engines off and cars off;" he may have said that.

THE COURT:

Q. Why didn't you try?

A. Well, the track was up.

MR. CATHCART:

Q. You didn't make any further attempt at all in the matter, as I understand it?

A. No, I made no attempt.

The next day he voluntarily returned to the stand and stated that he also remembered that he had said to Scott that he "would not accept the property under those conditions" (Tr. p. 491) and "refuse to accept the property as apparently tendered" (Tr. p. 492), and that what he was doing there was to lay the foundation for complying with the change of policy dictated by his client (Tr. p. 495). This is an admission that the property was tendered, that

he was told he could take the property off, but not over the rails, which had been taken up by the Kapiolani Estate. As the only claim of the plaintiff was to the rails and not to the use of the property or the ties on which they lay, or the ground on which the ties were, this evidence fails to sustain the contention that plaintiff could not recover the property, but shows that it could have gotten it if it desired.

*(c)

Upon the tender by Hutchins, not only by its agreement, but also by law, the plaintiff was obliged to accept or reject the tender, and it did not do this within a reasonable time, which of itself discharged the sureties.

It has been said that the acceptance of a conditional tender—and in this case the rule would be the same as to the conditional acceptance of the tender—creates a new contract. *Bickle vs. Beseke*, 23 Ind. 18. If so, the surety is discharged as a change in its contract. But whether this is so or not, the only condition imposed was that of getting actual possession, and the plaintiff agreed to notify at once if it could not secure this. No notice was given until May 27th that actual possession could not be procured. If the notice of that date is such a notice, this was an unreasonable delay and discharged the sureties. The plaintiff had the right to a reasonable time to determine whether it could get actual possession, if such time was necessary. But

in this case the plaintiff's attorneys in fact were attorneys for the only party which was litigating over any right of possession, although it appears from the evidence that that party was not claiming the property, but the land on which the property was. Certainly a week was ample time; and this is shown by the declaration of the plaintiff's attorneys themselves, who say on May 16th, 28 days after, that the matter had not received appropriate attention because of the illness of the writer of the letter. But on the 26th of April the writer was not ill, as appears from his signature to a letter offering to sell the property to Hutchins, to be delivered on the ground at some time after thirty days from April 19th. And there is no evidence in the case to show what the illness was, or that it was such as to prevent a speedy determination of the matter. There had been no change of policy, and plaintiff expected to take the property, until about the 21st of May, when the change took place and the alleged attempt to get possession was made. That was 34 days after the tender and 31 days after the agreement to at once notify, and the notice was not given until May 27th.

Diligence, where the facts are ascertained and undisputed, is a question of law for the court.

Rhett vs. Poe, 2 How. 457.

What is a reasonable time, where the facts are clear, is always a question exclusively for the court.

Earnshaw vs. United States, 146 U. S. 60.

Paine vs. Central Vermont R. R., 118 U. S. 152.

McCandless vs. Lansing, 19 Haw. 474.

Nunez vs. Dautel, 19 Wall. 560.

Citations of cases are of little value on this point. The agreement is to at once notify whether a delivery could be had of property the location of which was specified, and this fact should have been ascertained within a day or two at the most. No case can be found where a notice after forty days is held to be within a reasonable time. In the case of the removal of goods consigned by a common carrier, the cases have been collected by the editors of the *Lawyers' Reports Annotated*, in noting a case where it was held that one and one-half business days was a reasonable time.

8 L. R. A. (N. S.) 240.

And on contracts of sale six days, in one case, was held an unreasonable time to accept.

Dry Goods Co. vs. Reynolds, 64 Fed. 560.

see also:

The M. M. Hamilton, 17 Fed. Cas. 555.

The words used are "at once." This means immediately; forthwith; as soon as possible; as soon as, under the circumstances, could reasonably be done.

And three weeks is altogether too long a time to complete an investigation as to the purchaser's insolvency, where the agreement was to ship at once.

Oklahoma Vinegar Co. vs. Hamilton, 132

Ala. 593; 32 So. 306.

VI.

THE EXECUTION WAS IMPROPERLY ADMITTED, AND THE RETURN THEREON DOES NOT AFFECT THE DEFENDANTS — CERTAINLY IS NOT CONCLUSIVE AGAINST THEM.

It is not the execution and the return upon it which binds the defendants; it is the judgment. Therefore, they cannot be bound by what took place, although they may be relieved by what took place under the execution. Their obligation was not to return to the sheriff, but to return to the plaintiff. If no writ *de retorno habendo* had been issued, it would still have been the duty of the defendant to redeliver the property.

Douglass vs. Douglass, ubi supra.

Sweeny vs. Lomme, ubi supra.

Stevens vs. Tuite, ubi supra.

Carrico vs. Tayler, 3 Dana 33.

Peck vs. Wilson, 22 Ill. 205.

The only writ to be issued is the writ *de retorno habendo*.

Freeman on Executions, Sec. 468.

The return of "not satisfied" does not show that defendant has no property subject to the execution.

Freeman on Executions, Sec. 356.

Nor can the officer leave it uncertain, from his return, whether the writ has or can be executed.

Freeman on Executions, Sec. 357.

"To be sufficient, the return must show upon its face that the command of the writ has been complied with, or the existence of such a state of facts as, without fault or negligence on the part of the officer, hindered such compliance."

Freeman on Executions, Sec. 355.

Bank vs. Barnes, 29 Tenn. 244.

McCrovv vs. Chaffin, 31 Tenn. 307.

In the case at bar, the sheriff does not pretend to have complied with the writ, and says he did not satisfy it because he was unable to "levy" on the property described in the execution. The property described in the execution was the property which he was directed to take and deliver to the plaintiff; not to levy on at all. He was directed to levy on other property of the defendant, in case he could not take and return the property described in the writ. Of course he could not levy on that property. "Levy" means to seize or take by compulsion. If the property was tendered back and was in the possession of the plaintiff, it could not be seized and taken under the writ, so that the return would not contradict any testimony given by the plaintiff. But, outside of that, the officer must show in his return on a writ *de retorno habendo* that he could not find the property within his jurisdiction.

Am. & Eng. Enc. Law, Vol. 24, p. 536.

There is nothing to show that the sheriff could not find the property in the jurisdiction. It was his duty to take it, otherwise. If it is said that this is a return, that, although he could find it, he was unable to take it for a reason which the law would justify, the answer is that, in the first place, the reason is not stated and he cannot bind us by this general statement, and, in the second place, reasons given by an officer for not serving are not conclusive.

Hessong vs. Pressley, 86 Ind. 555.

Lindley vs. Kelley, 42 Ind. 294.

Parks vs. Alexander, 29 N. C. 412.

Gayso vs. Hickey, 4 La. 361.

Hassell vs. Bank, 39 Tenn. 380.

"It is not a due return if the endorsement be such as is not authorized by law, whether it be true or false. The endorsement on this execution 'no money made' is not authorized by law. If the property could be found, it was the duty of the sheriff to levy on execution and make the money, and so endorse the fact. If he could find nothing whereon to levy, that fact should be endorsed."

Harmon vs. Childress, 11 Tenn. 326.

The rule, however, is that such a return, even in the case of a forthcoming or delivery bond taken by the sheriff on execution, is only *prima facie* proof. The bond in this case has been well said to be somewhat similar to forthcoming and delivery bonds.

Am. & Eng. Enc. of Law, Vol. 13, p. 1132.

And the effect of a sheriff's return has been held by numerous decisions, with only one decision in

Arkansas to the contrary, to be that such a return is only *prima facie* evidence of forfeiture.

Am. & Eng. Enc. of Law, Vol. 13, p. 1149.
17 *Cyc.* 1380.

Williams vs. Crutcher, 5 How. 71 (Miss.) ; 35
Am. Dec. 422.

Adler vs. Green, 18 W. Va. 201.

In the Washington Ice Co. case, relied on so strongly by the plaintiff, evidence was admitted over objection to contradict the sheriff's return, with the apparent approval of this court.

Moreover, as the court below ruled, the return is only evidence of what took place whilst the execution was in the hands of the officer, and the evidence shows that it was in his hands but a very short time—at most, two days,—and, as we contended, and we think the evidence shows, only long enough to write out a return.

Freeman on Executions, Secs. 9a, 363.

Exceptions 6, 7 and 10, under which the execution and return were admitted, should be sustained. Plaintiff's Instruction No. 13-C (Exception 108) is misleading; if there is anything in the return which is admissible, the return is not conclusive, and therefore the instruction erroneous. Plaintiff's Instruction No. 14 (Exception 110) is erroneous in assuming that, upon the return of the execution, the right accrued to bring the action—an erroneous statement of law and confusing to the jury, and would lead them to infer that the return was conclusive.

VII.

THE WHOLE PROCEDURE OF THE COURT, AS SHOWN IN THE INSTRUCTIONS GIVEN AND REFUSED AND THE RULINGS ON EVIDENCE, WAS ERRONEOUS AS APPLIED TO THE FACTS IN THIS CASE. WHILE DENYING A MOTION FOR AN INSTRUCTED VERDICT, THE JURY WERE, IN EFFECT, INSTRUCTED TO RETURN A VERDICT AGAINST THE DEFENDANTS, AND, ONE BY ONE, EVERY GROUND ON WHICH THE DEFENDANTS STOOD WAS WITHDRAWN FROM THE CONSIDERATION OF THE JURY.

The defense of the defendants in this action was that they were sureties, and, as such, did not stand in the position of the defendants. But (Exception 98) the jury were instructed that Henry Waterhouse "in contemplation of law authorized said Clinton J. Hutchins, Trustee, to represent him in said action of replevin, and said Waterhouse thereby became identified with said Clinton J. Hutchins, Trustee, in interest * * * so as to be concluded by the proceedings and judgment in said replevin suit, and that the record of the proceedings and judgment in said suit are also conclusive and binding upon the defendants in this suit." This ignores an important factor in the relation of obligee and

surety. There are many things which, if done, would be binding on the principal but not on the surety. It is not everything in the action which is so binding, viz., assenting to a material change. The jury, under this instruction, were led to believe that the surety was bound by Hutchins, who represented him, and was bound by all Hutchins' actions in the return of the property.

Again (Exception 100), the jury were instructed that the offer must be accompanied by such action on the part of Hutchins as would enable the plaintiff to obtain actual possession of the property in question; entirely ignoring the plaintiff's demand that Hutchins let the property alone. So (Exception 101) the jury were instructed that the offer must be *bona fide*, which is material so far as the surety is concerned; and (Exception 103) that it was the duty of Hutchins to take such measures as would enable plaintiff to obtain actual possession of the property, and, if he did not, the verdict should be for the plaintiff. Active measures are again referred to (Exception 104) and the jury instructed that unless Hutchins sought and delivered the property the sureties were liable; (Exception 105) further active steps by Hutchins are demanded; (Exception 106) good faith was to be passed on by the jury; (Exception 109) the delivery was to be unconditional, although Hutchins clearly had the right to reserve the condition of prosecuting his appeal; (Exception 110) the right at once accrued to the plaintiff, upon the return of the execution, to main-

tain the action, and nothing else than the payment would constitute a defense; (Exception 111) under certain circumstances, if Scott was prohibited from going upon the land and taking the property off, the verdict must be for the plaintiff; and (Exception 112) if the rails "were lying on lands of third persons, and that neither Hutchins nor Scott made an attempt to secure the delivery of them to the sheriff, your verdict must be for the plaintiff." What this means as applied to the facts, we are unable to determine. The rails in question, or a substantial part of them, were lying on lands of third parties, and neither Hutchins nor Scott made an attempt to secure a delivery of them to the sheriff. They were simply delivered as they had been originally taken, in the same condition, and the plaintiff was willing to take a delivery in that same condition.

These instructions are clearly erroneous as applied to the case which the defendants made out. Their contentions, so far as the satisfaction of the bond is concerned, were:

(a) That the plaintiff took possession of the property through the Kapiolani Estate, Limited, and simply asked that its possession should not be interfered with.

(b) That Hutchins, in answer to this, tendered back the property in the same condition as it had been replevied, making the perfectly proper reservation that he intended to prosecute his appeal.

(c) That the plaintiff accepted this delivery,

without reservation, except that Hutchins was to keep his hands off the property.

(d) That the plaintiff, before demanding the property of Hutchins, had agreed with the Kapiolani Estate, Limited, to sell the property to it at any time within thirty days from the expiration of a previous option, the property to remain on the ground where it was, at the option of the Kapiolani Estate, Limited, viz., thirty days from April 19th, thus necessitating the property remaining where it was for thirty days.

(e) That the plaintiff and Hutchins entered into a further negotiation, in which the plaintiff agreed that Hutchins might buy the property at the end of this thirty days, subject to the previous option; in other words, buy it where it was, on the ground, after thirty days.

(f) That three weeks later the plaintiff complained that one Scott, who had been interested with Hutchins, was interfering with the property—a charge which was disproved.

(g) That a change of policy took place by which the plaintiff did not any longer desire the property, and that the execution was put in the hands of the sheriff, not for the purpose of taking the property, but for the purpose of *not* taking it and of laying the foundation for a suit for the value.

(h) That Scott, at Kona, notified Cooper that the property had been redelivered, but that he and

Hutchins stood ready to do everything they could to assist the plaintiff, if such assistance was necessary.

(i) That, whether the relations of the Kapiolani Estate, Limited, and Hutchins and Scott were hostile or not, the Kapiolani Estate was not standing in the way of the plaintiff's getting the property.

Upon these facts the defendants asked numerous instructions, seeking to differentiate the rights of the surety from the rights of the principal on the bond, and the obligation of the plaintiff to the surety is distinguished from his obligation to the principal and under what circumstances the surety would be released. Of all these instructions, but one was given: Defendants' Instruction No. XI, that the obligee was bound to act in good faith and with reasonable promptness towards the surety, and to accept or reject a valid tender; but this valid tender was to be made as otherwise instructed, and those instructions, given at the request of the plaintiff, we have referred to. It is true the jury had been instructed that a valid tender would discharge the sureties and that it did not have to be kept good; but these instructions have to be read in connection with the instructions requested by the plaintiff.

Upon the character of the obligation which the defendants assumed, every instruction was refused. Thus, defendants' Instructions II, that the undertaking was to be construed strictly, and the sureties were entitled to stand on the letter of their un-

dertaking; III, that the surety was entitled to good faith and confidence between the parties; XII (Exception 85), that the plaintiff cannot disable itself to promptly accept such delivery, and that if by the option to the Kapiolani Estate, Limited, it bound itself not to remove the railroad material in question for thirty days, this would discharge the surety; XIII (Exception 86), the estoppel on the Kapiolani Estate, Limited, which bears on the good faith of the plaintiff; 14 (Exception 87), the waiver of the plaintiff of the duty of Hutchins to seek out the plaintiff — an instruction which the facts amply warranted, and which is good law; 18 (Exception 89), that sureties are favorites in the law and are entitled to the utmost good faith from the creditor, who cannot enlarge, change or injuriously prejudice them, and that if they found from the evidence that the plaintiff first endeavored to sell the property and then adopted a change of policy and endeavored to create a liability on the bond, the sureties were released; 19 (Exception 90), that if it dealt with the property in the option as its own and under its control, it would be a waiver of tender and a release of the surety; 21 (Exception 92), that a refusal to accept tender is a waiver of tender, and that Hutchins would not be called upon to go to Kona and point out each item, but that the sureties would be released by such waiver. Every one was refused, as we contend, erroneously. In the mind of the Court, the giving of any of these instructions would be dangerous to the plaintiff's rights.

As the instructions are applicable to the facts, and are good in law, the only justification for refusing them is that there was nothing to go to the jury. Or, to put it in another way, while the jury were instructed to pass upon the facts, each specific fact was taken from their consideration, and each rule of law applicable to the fact was refused to be given to them. What was left to be submitted was a simple proposition, from which there is no escape on the facts, viz.:

Did Hutchins seek out the plaintiff and tender the property in good faith? Clearly he did not; because the plaintiff sought him out. Moreover, in order to constitute a seeking out and tender in good faith, the jury were instructed that it must be shown that Hutchins did certain acts to put the plaintiff in possession; not only that he tendered the property, but that he did the acts, which could not be shown because the plaintiff was already in possession of the property through the Kapiolani Estate, Limited.

Space forbids reviewing these exceptions in detail. We only recall plaintiff's instructions 15 and 16, which absolutely ignore the issue of tender and prompt action, and instruct the jury that if, at a time thirty days later, when the execution was in the hands of the sheriff, certain things had been done and Scott was prohibited from going upon the land, the verdict must be for the plaintiff; and if a substantial part of the rails were lying on lands of

third persons, and neither Hutchins nor Scott made an attempt, thirty days later, to secure the delivery to the sheriff, the verdict must be for the plaintiff. Sureties cannot be bound by acts of their principals or failure to act thirty days after a valid tender and refusal or acceptance of that tender.

VIII.

THE ADMISSION OF THE TRUST DEED—
HUTCHINS TO THE HENRY WATERHOUSE
TRUST COMPANY, LIMITED — AND THE
RULINGS CONCERNING THE SAME ARE MA-
TERIAL ERROR, PREJUDICIAL TO THE DE-
FENDANTS, AND DEMAND THAT THE EX-
CEPTIONS BE SUSTAINED AND A NEW
TRIAL GRANTED.

This question arises under (Exception 66), when a certified copy of this deed was admitted in evidence over the objection of the defendants; (Exception 74) when Mr. Shingle, president of the Henry Waterhouse Trust Company, Limited, was on the stand, and, having testified that the deed had terminated some time in January, 1904, long prior to the time in question, was asked whether the Henry Waterhouse Trust Company, Limited, made any claim to this property against the plaintiff, which question was excluded on the ground that it was irrelevant and immaterial and not proper surrebuttal, and was

further asked (Exception 75) "or make any claim to the property after that time (meaning January, 1904) as against C. J. Hutchins, Trustee," which was excluded on the same ground; (Exceptions 102 and 106) two instructions requested by the plaintiff, under the former of which the Court instructed the jury, in reference to this trust deed, "that the recording of that deed in the Registry Office gave notice to the plaintiff that the legal title to the property had been transferred by Hutchins to the Henry Waterhouse Trust Company," and, further, that if they found that an actual tender had been made by Hutchins and refused by the plaintiff, the jury could take into consideration the fact "that said conveyance to the Waterhouse Trust Company was on record, in deciding whether plaintiff was justified in refusing the tender," while under the latter, in instructing whether the offer or tender was made in good faith, the jury were told, "In this connection you should consider whether it has been shown that at the time the offer was made Hutchins had authority to return the property;" (Exception 93) where the Court refused the defendants' request to instruct the jury that, although they might find from the evidence that there were certain claims against the property, if nevertheless they found from the evidence that the plaintiff "was not influenced by said claims, then said claims cannot be urged by plaintiff as a ground for a refusal to accept a tender."

(Exception 124A), from which it appears that a

few minutes before the jury returned their verdict, and after they had been out some hours, they sent for this trust deed and the instrument to which it refers for a description, viz., the deed from Dortch to Hutchins, Trustee, to the admission of which defendants had excepted under Exception 24, and the papers having been delivered to them under the objection of the defendants that they were immaterial and it was improper, and having considered them, they returned a verdict against the defendants. The Court, in other words, admitted this instrument, which only purported to convey by way of mortgage, not the property, but "all the right, title and interest" of C. J. Hutchins, Trustee, in the property, which the evidence showed had been terminated by the performance of its condition before maturity, for two purposes: one, to justify a verdict for the plaintiff, if in their estimation the existence of this trust deed was sufficient ground for the refusal of the tender, a ground which was doubly vicious, for the fact that the deed was on record is not material on the question of tender and refusal, since it did not affect the refusal in fact, since plaintiff was unaware of it; and, again, it left it to the jury to determine what weight should be given to the recorded deed, whereas it is a matter of law for the Court to determine whether the defendants were justified in refusing because of the recorded deed. The other purpose is to show want of power in Hutchins to return. The recorded deed is notice to subsequent purchasers and incumbrancers only (of whom the plain-

tiff was not one) of an outstanding incumbrance (Jones on Mortgages, Sec. 523, 530, 723); but in this case the outstanding incumbrance did not exist, or, if objected on that ground, the outstanding title could have been discharged. To make the matter worse, we were not allowed to show (Exception LXXIV) that the Henry Waterhouse Trust Company, Limited, made no claim against the plaintiff; (Exception LXXV) that it made no claim against the defendants. Upon the other hand, the jury were instructed, under Exception 106, to find whether it had been shown at the time the offer was made that Hutchins had authority to return the property; which left it open to the plaintiff to argue that Hutchins had no such authority, since the deed was on record.

Defendant sought to remedy these errors by the instruction refused and excepted to under (Exception 93), viz.: that in justifying the refusal of a tender one cannot advance a reason which he did not have in his mind. The jury should have been instructed that if the claim did not influence its action, the jury should not consider it. The reason is obvious. If Mr. McClanahan had declined the tender because of the trust deed, the defendants could have had it immediately discharged.

Besides all this, the mortgage was terminated and wholly discharged, and could have no effect on the right of Hutchins to tender or the right of the plaintiff to refuse.

"SEC. 886. *At common law, payment or tender of payment at the time mentioned in the condition of the mortgage wholly discharges the incumbrance. Payment before the day named in the condition, equally with payment at the day, saves the breach of the condition and defeats the estate. In such case no written release is needed except as evidence of the facts, and to remove the apparent incumbrance from the records.*"

Jones on Mortgages, Sec. 886.

The giving of the instruction (Exception 106) and the refusal to give the instruction (Exception 93) are equally vicious, on this ground: The plaintiff should not have been allowed to go to the jury on the question of whether Hutchins had authority to return, since he was described in the Dortch deed as trustee. That term is merely *descripto personae*. He had been sued by the plaintiff personally, with the addition of that appellation. He had answered, judgment had been obtained against him, and the property had been replevied from him in that form and redelivered by a redelivery bond given. Under what pretense could the plaintiff, as it did, go to the jury on the question whether Hutchins, being a trustee, had a right to return the property? Outside of this, it appeared at the trial that the only person interested, besides Hutchins, was M. F. Scott, and the uncontradicted evidence is that Scott was doing all he could to return the property.

IX.

THE COURT ERRED IN ASSUMING THAT THE JUDGMENT IN THE CIRCUIT COURT, IN FAVOR OF BIERCE AND AGAINST HUTCHINS, TERMINATED HUTCHINS' TITLE IN THE PROPERTY AND GAVE IT TO THE BIERCE COMPANY.

"The contract says in terms that it is conditional, and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation is perfectly lawful."

Bierce vs. Hutchins, 205 U. S. 340.

"Such sales sometimes are regulated by statute and put more or less on the footing of mortgages."

Bierce vs. Hutchins, *ubi supra*.

"It is an executed contract, one by which the ownership passed to the appellee, with a reservation of title simply as security for the purchase money—in other words, an equitable mortgage."

Beardsley vs. Beardsley, 138 U. S. 262.

"A sale, with retention of the legal title, is security for purchase money."

Beardsley vs. Beardsley, *ubi supra*.

The original action was not brought to secure a forfeiture, but to obtain possession of the property, on the ground that payments had not been made.

Exhibit "A" attached to the complaint showed that bills of sale of the property were delivered, and the right to re-take is based on the failure to pay and the fact that Hutchins retained possession, contrary to the right of the plaintiff. But nowhere were there any facts alleged or any prayer to foreclose the equitable title of the defendant, which had passed to him by the sale from Dortch. The judgment then simply determined the right to the possession, on the ground that the title had been retained as security and had no effect to foreclose or forfeit any rights of the defendants.

Forfeitures are not favored in Hawaii.

Hong Kim vs. Hapai, 13 Haw. 328.

In fact, it would appear that the law here is that if a rescission is to be made of the contract, the parties must be restored to their original position and the consideration money which had been received by Bierce should be restored.

Delemar vs. Hobron, 3 Haw. 748.

The defendant had an equitable title, which he was entitled to make a legal one at any time before it was foreclosed by the payment of the debt, and which the plaintiff could only foreclose by having the property sold and paying the surplus, if any, to the equitable owner.

Puffer vs. Lucas, 112 N. C. 377; 17 S. E. 174;
19 L. R. A. 682.

Tufts vs. D'Arcambal, 85 Mich. 185; 24 Amer.
St. Rep. 79.

The plaintiff must either rescind the contract and return the consideration, or else it is still liable, upon payment of the amount due, to deliver the goods upon payment under the original contract.

Miller vs. Steen, 30 Cal. 403; 89 Am. Dec. 124.

And it is well settled that a conditional sale vests an interest in the buyer that he can sell or mortgage.

Beach's Appeal, 58 Conn. 473.

We raised the question promptly under (Exceptions XVII, XVIII, and XIX), which in themselves are not so important, save that they show the attitude of the court. Mr. Robertson called for the production of these deeds. We promptly objected to their production, and the court declined to rule, holding, in effect, that it was powerless; in other words, that counsel could put a witness on the stand, call for testimony which was irrelevant and immaterial, and counsel on the other side could not object to its production, but had to wait until the counsel calling for it could examine the evidence and see whether it was material or relevant. It would appear that we had the right to object to a line of testimony and to the production of this testimony without being exposed to the lectures given by the court. We were entirely denied any ruling.

The court again erred, under (Exception XXIII), in admitting the deed from Hutchins to McStocker, and under (Exception XXIV) the Dortch deed. The former deed purports to convey certain lands and

seases and a sugar mill, and all other personal property conveyed by Dortch not heretofore assigned to C. J. Falk or J. R. Sloan. It nowhere mentions railroad or railroad equipment. The latter conveyed all the right, title and interest of the Kona Sugar Company, Limited, in the railroad and railroad equipment, whatever that right, title and interest is, and is introduced, we assume, to identify the property conveyed in the McStocker deed. But (1) it is not shown what property was conveyed to Falk and Sloan, (2) all reference to railroad stock and equipment is sedulously left out of this deed, although contained in the Dortch deed, and (3) the Dortch deed does not purport to convey the property itself, but a right, title and interest, if any; and the poor jury, confused already by the introduction of deeds which had no relation to the question of whether a tender or delivery of the property had been made in good faith, were instructed (Exception 115) that the legal construction of the deed to McStocker was to convey all there was conveyed to Hutchins by the Dortch deed, excepting what he had conveyed to Falk and Sloan—a confusing and misleading instruction, and intended to lead the jury to believe that Hutchins was then conveying the property to McStocker, and that the doing of that act showed that no tender or delivery of the property had been made one and a half years before, and this at a time when the Supreme Court of this Territory had ordered judgment for the defendants and there was no pending appeal to Washington.

We submit that the after-transactions of Hutchins are immaterial as bearing on the question of delivery or tender; that, in fact, there is no evidence that he did convey his interest, that he had a right to convey his interest, and that the conveyance would have no weight in determining whether, in good faith, he had tendered the property a year and a half before, because that tender was made subject to the right to litigate his own title; and, lastly, at the time when the deed was made, a judgment had been rendered apparently conclusive in its favor.

The same point arises under another line of exceptions. For instance (Exception 114), in which the jury were charged that "the Court having decided in the replevin case that the property belonged to the plaintiff, the plaintiff had the right to sell it or give an option on it whether plaintiff had actual possession of it at the time or not;" and that the option in question could therefore have been given without prejudicing in any way the plaintiff's claim that Hutchins had not made a redelivery of the property. The court did not decide that the property belonged to the plaintiff. It decided that it had the title and right to the possession, but it did not decide that the property belonged to it or that it had the right to sell it or give an option on it, but, if it had, the property being still in the hands of the law and covered by the replevin bond and the redelivery bond, no judgment except a final judgment would give any right to sell or give an option. What-

ever right there is must flow from the contract rights of the parties, and not from the judgment.

The court is in error in assuming that the judgment had changed the rights of the parties. The instruction is still more vicious on the further ground that the option could be given without prejudicing in any way the plaintiff's claim that Hutchins had made a redelivery of the property, which shut out the option from the consideration of the jury.

Our contention was and is that under all the evidence in the case, including this option, it is clear that a tender in good faith was made and accepted and that the plaintiff, for the period of about thirty days, and until it changed its policy, understood that the property was in its possession through the Kapiolani Estate, Limited, to whom it had given this option; and, further, that the giving of the option, and the consequent failure to take a position either one way or the other on the tender, either to decline or accept it, was such an extension of time that it discharged the sureties, and yet the jury were charged that it could be given without prejudicing in any way the plaintiff's claim because of the giving of the judgment in the replevin action. We call attention to the fact that this instruction takes away from the jury the power of considering this option, in connection with the other evidence, to sustain our point, which is, that when the tender of the property was made by Hutchins it was the duty of the plaintiff to the sureties either to accept or reject, and that if prior to this time or at this time it had given

an option to the Kapiolani Estate, Limited, by which it was to leave the property exactly where it was and make no effort to secure it for thirty days, and if its notice to the defendant not to interfere with the property was in the interest of this option, then if, at the end of thirty days, there was any difficulty in getting the property, that could not be charged to the sureties, who were released by its failure to act upon the tender, and that it was not enough for it to say that it accepted the tender if it could get the property after thirty days.

X.

THE COURT ERRED IN REFUSING THE INSTRUCTIONS REQUESTED BY THE DEFENDANTS UNDER EXCEPTIONS 85, 86, AND 87.

In reference to the effect of a contract with the Kapiolani Estate, Limited, not to remove the material for thirty days, as a discharge of the sureties, as an estoppel on the Kapiolani Estate, Limited, to claim against the plaintiff, and as a waiver of tender, we respectfully submit that all three of these instructions should have been given. The jury could properly have found that the contract with the Kapiolani Estate, Limited, as a matter of fact, from all the circumstances, if not as a matter of law, from the written instrument employed, was that the Kapiolani Estate, Limited, should have the right to have the railroad material remain where it was for

thirty days. They were not taking this option in order to remove the material. They wished to use it where it was, and if the plaintiff entered into a contract to leave it where it was for thirty days, then this would have the effect to discharge the sureties, under the admitted law in this case and the instructions of the court.

The instruction asked (Exception 86) is elementary law. The Kapiolani Estate, Limited, having taken this option, was estopped to claim against the plaintiff, and the jury could rightfully consider it as a matter of bad faith on the part of the plaintiff to say that the reason it could not get the property was because the Kapiolani Estate, Limited, claimed it, with whom it was dealing and which admitted its title.

Under the circumstances in this case, it is clear that the instruction asked (Exception 87) should have been given. The jury might well have inferred, from the giving of the plaintiff's instructions (Exceptions 102, 103, 104 and 109) upon this point, that the defendants were liable because Hutchins did not get there first with his tender or offer to return. We had a right to go to the jury on the proposition that, in response to a request from the plaintiff, we had returned or offered to return the property.

XI.

**THE EXCLUSION OF THE TESTIMONY OF
THE WITNESS COLBURN WAS MATERIAL
ERROR.**

The defendants, to meet the case of the plaintiff, had introduced evidence tending to show a return of the property or an offer to return in good faith. The plaintiff, to meet this, introduced evidence tending to show that it could not get the property, because of the objections of the Kapiolani Estate, Limited.

The defendants called John F. Colburn, the treasurer and manager, who was admitted to be "the whole cheese" of the Kapiolani Estate, Limited, and, in order to lay the foundation to prove a release of this railroad property to the plaintiff by the Kapiolani Estate, Limited, prior to the offer to redeliver the property, offered to show that the original of a document, a carbon copy of which it produced, and which original it had requested the plaintiff previously to produce, was executed by the president and treasurer of the Kapiolani Estate, Limited, and delivered to the attorney-in-fact of the plaintiff; that the witness had not seen the document since the time of its delivery, and it was then in the hands of the attorneys of the plaintiff. The evidence was rejected, and we were unable to show the release by proving that a certain paper which

the witness produced was a carbon copy of an executed release.

Under Section 1945, Revised Laws of Hawaii, upon proof of the facts which we offered to prove, we could have put the release in evidence; but the court refused us the opportunity to prove that the unexecuted carbon copy was a *fac simile* impression of an executed and delivered document, and, under (Exception 73), broadly refused to allow us to prove a surrender or release at any time between the 14th day of April and 23rd day of May, 1904.

We did not understand at the time on what ground this evidence was shut out, and it is so clearly admissable and so important in the cause that we think we can fairly leave it at this point to the plaintiff to explain how these rulings can be justified. As the testimony was surrebuttal of that of the witness, Cooper, who had just been on the stand in rebuttal, it certainly could not be excluded on the ground that it was not proper surrebuttal. We had endeavored, in cross-examining Cooper, to establish the execution of this release, and failed. It therefore left the case without the release proved. This was our first opportunity to prove the release, and we called the attention of the court to the fact that we were endeavoring to rebut the testimony of Judge Cooper in reference to his difficulty in getting possession of the property from the Kapiolani Estate, Limited.

An examination of the instrument shows that it is a surrender of all claim on the part of the Kapiolani

lani Estate, Limited, and a consent to the right of removal of the property from its premises. Such a surrender, if not conclusive evidence that the plaintiff had resumed possession, was evidence to go to the jury upon that fact, in view of Mr. McClanahan's letter that he accepted the return if he could get the property. *This release showed that he could get the property.*

Respectfully submitted,

WILLIAM R. CASTLE,

DAVID L. WITHINGTON,

W. A. GREENWELL,

ALFRED L. CASTLE,

For Defendants in Error.

APPENDIX.

THE REVISED LAWS OF HAWAII, 1905.

SEC. 1851. CREDITORS' CLAIMS, ADVERTISEMENT, BARRED WHEN. Immediately after the appointment of any executor or administrator of any estate, he shall advertise in such newspaper or newspapers as the court shall direct, for as long a time as the court may order, at least once a week for four weeks, a notice to all creditors of the deceased to present their claims, duly authenticated and with proper vouchers, if any exist, even if the claim is secured by mortgage upon real estate, to him, either at his residence or place of business, within six months from the day of such publication. And if such claims be not presented within six months from the first publication of the notice, or within six months from the day they fall due they shall be forever barred, and the executor or administrator shall not be authorized to pay them.

SEC. 1853. SUITS ON REJECTED CLAIMS, COMMENCED WHEN. If any claim be rejected by the executor or administrator he shall give written notice of such rejection to the creditor, and suit must be brought upon it against the executor or administrator within two months after such notice is given, or within two months after the same becomes due, or it will be forever barred.

SEC. 1854. OTHER SUITS, COMMENCED WHEN. Executors and administrators shall in no case be liable to suit until the expiration of six calendar months after probate, or the granting of letters of administration, except in cases of rejected claims as provided in section 1853.

SEC. 2102. AFFIDAVIT BY PLAINTIFF. Where a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1. That the plaintiff is the owner of the property claimed, (particularly describing it) or is lawfully entitled to the possession thereof.

2. That the property is unlawfully detained by the defendant.

3. That the same has not been taken for a tax, assessment or fine pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff, or if so seized, that it is by the statute, exempt from such seizure.

4. The actual value of the property.

SEC. 2103. NOTICE TO SEIZE. The plaintiff or his attorney may thereupon, by an indorsement in writing upon the affidavit, or by other written request thereto attached, require the high sheriff, or his deputy, or the sheriff of the island where the suit is brought, or his deputy, to take the property from the defendant; PROVIDED that no property shall be taken by virtue of this chapter beyond the jurisdiction of the court from which such process issues.

SEC. 2104. BOND BY PLAINTIFF; SEIZURE; SERVICE OF CERTAIN PAPERS. Upon receipt of the affidavit and notice, with a written undertaking executed by two or more sufficient sureties approved by the high sheriff or by his deputy, or by such said sheriff, or by his deputy, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the

high sheriff or his deputy, sheriff or his deputy, shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found; or to his agent from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them in the nearest postoffice, post paid, and addressed to the defendant.

SEC. 2106. OBJECTIONS TO SURETIES. The defendant may, within two days after the service upon him, or his agent, as above provided, of a copy of the affidavit and undertaking, or, if he be served with such copy upon an island other than that upon which such action is commenced, within ten days after such service, give notice in writing to the high sheriff, his deputy, sheriff or his deputy, at the seat of the court issuing the process therein, that he objects to the sufficiency of the sureties. If he fails to give such notice within the time specified, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties or others in their place shall justify, as hereinafter provided; but where other sureties are substituted for the original, there shall be a new undertaking.

SEC. 2109. DELIVERY OF PROPERTY TO PLAINTIFF. Where the objection to the sureties is waived, as provided in section 2106, or if, after such objection having been made, the sureties or their substitutes shall justify as provided in section 2108, the high sheriff or other officer having charge of the property taken from the defendant shall immediately deliver the same to the plaintiff.

SEC. 2111. PROPERTY CLAIMED BY THIRD PARTIES. If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto, or of his right to the possession thereof, stating the grounds of such title or right, and serve the same on the high sheriff, his deputy, sheriff or his deputy, such officer shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand upon him or his agent, shall indemnify such officer against such claim by a sufficient undertaking executed by two sufficient sureties, accompanied by their affidavit, (if such officer require,) that they are each worth double the value of the property as set forth in the affidavit of the plaintiff, over and above mortgage debts and other liens upon their property, and that they are householders or freeholders resident within the Territory.

SEC. 2112. BOND FOR DELIVERY TO DEFENDANT. At any time before the delivery of the property to the plaintiff the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof upon giving to the officer a written undertaking executed by two or more sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except where the property is claimed by a third party, as is provided in section 2111.

An Act To amend sections fifty-six, eighty, and eighty-six of "An Act to provide a government

for the Territory of Hawaii," approved April thirtieth, nineteen hundred.

(Act of March 3, 1905, ch. 1465, 33 Stat. L. 1035.)

SEC. 3. (*Review by Supreme Court of the United States.*) That section eighty-six of the aforesaid Act be amended by adding the following at the end of said section: "*Provided, That writs of error and appeals may also be taken from the supreme court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars.*" (33 Stat. L. 1035.)

SEC. 4. (*In effect.*) That this Act shall take effect and be in force from and after its passage. (33 Stat. L. 1035.)

SECTION 17. Section 71 of said Chapter LVII (Civil Laws, Sec. 1435) is hereby amended so as to read as follows:

"Section 71. An appeal duly taken and perfected in any case from a judgment, order or decree of a Circuit Judge or District Magistrate shall operate as an arrest of judgment and stay of execution; Provided, however, that the Judge or Magistrate may, upon good cause shown, allow execution to issue or other appropriate action to be taken for the enforcement of such judgment, order or decree, pending such appeal, unless the applicant shall within such time as shall be allowed by the Judge or Magistrate deposit a bond in such amount and with such sureties as shall be approved by the Judge or Magistrate (the amount to be not less than double the amount of the judgment, order or decree, if it is money judgment, order or decree) conditioned for the prosecution of the appeal without delay and for

the payment or other performance, as the case may be, of the judgment, order or decree or part thereof that may be rendered or affirmed in the appellate court; and, provided further, that no political corporation or officer or executor, administrator, guardian, trustee, or receiver, acting in his official capacity, need deposit such bond in order to prevent the enforcement of such judgment, order or decree, pending the appeal, and provided further, that in case of an appealable order of a Circuit Judge for counsel fee, suit money, temporary alimony, or other provisional order of a like nature made before final judgment in the cause, an appeal shall not operate as an arrest of judgment or stay of execution, if the appellee shall deposit a bond in such sum and with such sureties as the judge shall approve, conditioned for indemnification of the appellant for all damages that he may sustain by reason of the payment or execution of such order, in case the appeal shall be sustained."

SECTION 19. Section 75 of said Chapter LVII (Civil Laws, Sec. 1239) is hereby amended so as to read as follows:

"Section 75. Upon the allowance of such bill of exceptions and the deposit of twenty-five dollars, or a bond of the same amount, by the party excepting with the clerk of such Court, for costs to accrue in the Supreme Court, the questions arising thereon shall be considered by the Supreme Court; but judgment may be entered and may be enforced or arrested pending such exceptions as provided in Section 71 in the case of an appeal, *mutatis mutandis*."

SECTION 22. This Act shall take effect on the first day of August, 1903.

C. L., Sec. 1239. Upon the allowance of such exceptions and the deposit of twenty-five dollars, or a

bond of this amount, by the party excepting, with the Clerk of such Court, for costs to accrue in the Supreme Court, the questions arising thereon shall be considered by the Supreme Court. If, however, the exceptions shall appear to the Judge before whom the trial is had to be frivolous, immaterial or intended for delay, judgment may be entered in the cause, and execution may be awarded or stayed on such terms as the Judge shall deem reasonable, notwithstanding the allowance of exceptions. 5

WILLIAM W. BIERCE, LIMITED, *v.* WATERHOUSE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF
HAWAII.

No. 508. Argued December 12, 1910.—Decided January 16, 1911.

This court disapproves of the practice, followed by an intermediate appellate court in this case, of reversing a judgment on one of a number of assigned errors without passing on the others; it is likely to involve duplicate appeals.

Increasing the *ad damnum* of a suit in replevin to an amount within the penalty of the bond by amendments to make the declaration conform to the evidence as to value is not, under the laws or practice of Hawaii, illegal, nor does it have the effect of discharging the sureties.

The surety on a bond given in course of a judicial proceeding is represented in that proceeding by his principal, and becomes responsible, to the amount of the penalty, for amendments allowed by the court that do not introduce new causes of action.

A plaintiff suing in replevin is not estopped from showing that he

219 U. S.

Statement of the Case.

mistakenly undervalued the property sought to be recovered; and one becoming surety for performance of a judgment of the court in a pending suit is bound by the judgment against his principal to the limit of his obligation.

In the absence of fraud and collusion the question of value of property taken under replevin as found in the replevin suit cannot be relitigated in a suit against the sureties on the redelivery bond.

The effect of a petition for rehearing, if duly filed and entertained by the court, is to prevent the judgment from becoming final and reviewable until disposed of, and when disposed of, an appeal from the judgment is regulated by the statutes then in force, even if enacted after the original decision; and so held as to an appeal from the Supreme Court of Hawaii under the act of March 3, 1905.

Litigants and their sureties are subject to the power of the sovereign to extend the right of review and appeal pending litigation, and no fundamental rights are denied or contractual rights of the parties affected by the exercise of that power.

A redelivery bond is executed subject to such possible changes in the procedure as do not affect the contract, and under the law of Hawaii, as amended during the pendency of this litigation, the action against the sureties was properly brought.

In this case, as the evidence of tender of delivery was not unequivocal, the question of whether the property was actually restored was for the jury, and the charge being full and fair, there was no error.

18 Hawaii, 398, reversed.

THIS was an action for breach of the condition of a redelivery or return bond executed by the defendant to a certain replevin suit instituted in a Circuit Court for the Territory of Hawaii. The bond was in these words:

"Circuit Court, Third Circuit, Territory of Hawaii.

\$1.00 stamp.

William W. Bierce, Limited, a Corporation, Plaintiff,

v.

Clinton J. Hutchins, Trustee.

Replevin.

Return Bond.

"Know all men by these presents:

"That we, Clinton J. Hutchins, trustee, as principal, and Henry Waterhouse and Arthur B. Wood, as sureties,

VOL. CCXIX—21

are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns, in the sum of thirty thousand (30,000) dollars, for the payment of which, well and truly to be made, we bind ourselves, our successors herein and administrators, jointly and severally, firmly by these presents.

"The condition of the foregoing obligation is as follows:

"That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii a replevin suit against Clinton J. Hutchins, trustee, to recover from him certain property specifically set forth in the bill of complaint filed in said suit, and of the value of \$15,000, as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the high sheriff of the Territory of Hawaii, or his deputies, and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said high sheriff and his deputies:

"Now, therefore, if the said property and all thereof shall be well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may for any cause be recovered against the defendant, then this obligation to be null and void; otherwise to be and remain in full force and effect.

"In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Signed) CLINTON J. HUTCHINS, *Trustee*.

(Signed) HENRY WATERHOUSE, *Surety*.

(Signed) ARTHUR B. WOOD, *Surety*.

The foregoing bond is approved as to its sufficiency of sureties.

Dated July 21, 1903.

(Signed)

A. M. BROWN,
High Sheriff."

The replevin suit referred to was instituted July 20, 1903, by a corporation styled William W. Bierce, Limited, against Clinton J. Hutchins, trustee, and was for the recovery of certain railway material which had been conditionally sold to the Kona Sugar Company, another corporation. The property of the latter company, including this material, was acquired at a receiver's sale by Hutchins, trustee, with notice that the title had been retained by the Bierce Company, and that the property had not been paid for. The plaintiff's affidavit (Rev. Laws Hawaii, § 2102) stated the value of the material which it was sought to reclaim at \$15,000, and a bond in double that sum was duly executed with the usual conditions of such replevin bonds. The defendant Hutchins thereupon, in order to retain possession of the material claimed, executed a redelivery or return bond under § 2112, Rev. Laws Hawaii, being the bond upon which the present action is based.

The replevin suit resulted, on March 19, 1904, in a judgment for the plaintiff and against the defendant Hutchins, trustee, for the return of the property and damages for its detention, or in default of return, that the defendants pay the value of the property, which was adjudged to be \$22,000.

Inasmuch as the defense by the surety in the action upon the return bond referred to grows in part out of matters which were litigated in the replevin suit, we must state somewhat fully the proceedings in that action. That case, upon a bill of exceptions, was taken to the Supreme Court of Hawaii. Certain of the exceptions taken by the defendant Hutchins were sustained in a judgment rendered January 28, 1905, one of which was that the trial court had erred in not rendering judgment for the defendant *non obstante veredicto*. See *Bierce v. Hutchins*, 16 Hawaii, 418. A motion for a rehearing was disposed of in that court April 29, 1905 (see 16 Hawaii, 717). On May 6,

1905, a judgment was entered reversing the judgment of the Circuit Court, and remanding the case, with direction to render a judgment for defendant *non obstante veredicto*. Thereupon an appeal to this court was allowed, where the judgment of the Hawaiian Supreme Court was reversed, for the reasons appearing in the opinion reported in 205 U. S. 340, and the case remanded to that court. Thereupon the Supreme Court of Hawaii held that the defendant Hutchins was then entitled to have a hearing upon other exceptions not passed upon at the first hearing. These were therefore heard and overruled. 18 Hawaii, 374. An appeal from that judgment was taken to this court, and dismissed, as not from a final judgment. 211 U. S. 429.

Pending the review proceedings above referred to the plaintiff, upon cause shown, obtained a rule on the defendant Hutchins to give a new redelivery bond. Failing in this an execution issued to recover the property which the defendant had been directed to return, and for the damage for detention and costs. These damages, amounting to \$1,050, and the taxed costs were paid and may be dropped from consideration. The sheriff returned that he was unable to obtain possession of the materials for which the action had been instituted, and therefore, returned the execution unsatisfied.

Pending the review proceedings already stated this action was begun against the obligors and the executors of Henry Waterhouse, one of the sureties upon the return bond given by Hutchins as stated. Wood, the other surety, was sued but was not found. Hutchins, for reasons immaterial, was dropped out. Upon the issue joined there was a verdict and judgment against the executors of Waterhouse for \$22,000, the value of the property which the obligor had failed to return as required by the judgment in the replevin suit, that being the value adjudged in that action, together with interest and costs of former

219 U. S.

Argument for Plaintiff in Error.

actions not paid, the whole aggregating \$28,156.74, for which there was judgment.

A bill of exceptions was taken from this judgment to the Supreme Court of Hawaii, which court, passing over the great majority of exceptions without ruling, sustained one which assigned error in the overruling of the motion of the defendant below for judgment *non obstante veredicto*.

The case having been remanded for judgment pursuant to the opinion and mandate, there was a judgment, notwithstanding the verdict for the defendant. This in turn was affirmed by the Supreme Court of the Territory, and the present writ is sued out to review that judgment.

Mr. Frederic D. McKenney, with whom *Mr. Henry W. Prouty* was on the brief, for plaintiff in error:

The lower court erred in ruling that the sureties were discharged by the amendments of the complaint in the replevin suit, increasing the alleged value of the property from \$15,000 to \$22,000. The amendments were properly made during the course of the trial by leave of court, in order to make the pleadings correspond with the proofs, and the *ad damnum* as increased was within the penalty of the bond. No new cause of action was introduced by the amendments, and the liability of the sureties was not thereby increased. Section 1145, Session Laws Hawaii, 1903, 366; Revised Laws Hawaii, 1905, § 1738; *Wood v. Denny*, 7 Gray, 540; *National Bank v. Jones*, 151 Massachusetts, 454; *Jamieson v. Capron*, 95 Pa. St. 15; *Hare v. Marsh*, 61 Wisconsin, 435; *Evers v. Sager*, 28 Michigan, 48, 52; *Merrick v. Greely*, 10 Missouri, 106; *Hanna v. International Petroleum Co.*, 23 Ohio St. 622; *New Haven Bank v. Miles*, 5 Connecticut, 587; *Carr v. Sterling*, 114 N. Y. 558; *Shepard v. Pebbles*, 38 Wisconsin, 373, 378; *Cobbey on Replevin*, § 1331; *Bradford v. Frederick*, 101 Pa. St. 445. To the same effect, see *Hocker v. Wood's Ex'r*, 33

Pa. St. 466; *Tracy v. Maloney*, 105 Massachusetts, 90; *Cutter v. Evans*, 115 Massachusetts, 27; *Knight v. Dorr*, 19 Pick. 48, 51; *Smith v. Mosby*, 98 Indiana, 445; *Schott v. Youree*, 142 Illinois, 233, 243; *Kennedy v. Brown*, 21 Kansas, 171; *Council v. Averett*, 90 N. Car. 168.

The condition of the bond was that the property should be delivered to said plaintiff if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause, be recovered against the defendant. *Mason v. Richards*, 12 Iowa, 74; *Richardson v. Bank*, 57 Ohio St. 299, 308, 315. See also *Christiansen v. Mendham*, 61 N. Y. 326; *Waldrop v. Wolff*, 114 Georgia, 610, 620.

The case at bar is clearly distinguishable from an action on a replevin bond following a judgment of dismissal of the replevin suit for want of prosecution where there is no trial on the merits. See *Smith v. Mosby*, 98 Indiana, 445, 448; *Bridgeport Ins. Co. v. Wilson*, 34 N. Y. 275, 280; *Irwin v. Backus*, 25 California, 214; *Braiden v. Mercer*, 44 Ohio St. 339; *Heard v. Lodge*, 20 Pick. 53, 58; 2 Brandt on Surety, 3d ed., § 563.

A verdict in claim and delivery is conclusive against the sureties of the defendant in replevin. *Parish v. Smith*, 66 So. Car. 424; *Waldrop v. Wolff*, 114 Georgia, 610, 620; *Stovall v. Banks*, 10 Wall. 583; *Richardson v. Bank*, 57 Ohio St. 299; *Hiriat v. Ballon*, 9 Pet. 156; *Washington Ice Co. v. Webster*, 125 U. S. 426.

The refusal or failure of the territorial Supreme Court to pass upon the remaining grounds was equivalent to the denial or rejection thereof by that court, and in the absence of exception to such denial or rejection by the party aggrieved, should stand as the final disposition thereof, not open to review by this court.

Parties to contracts have no vested right to insist that legislatures, during the pendency of said contract or the continuance of rights and liabilities thereunder shall re-

frain from adding to or taking from statutory remedies theretofore provided for the enforcement of or defense against such rights and liabilities, if adequate remedy for such enforcement or the making of defense thereto, shall remain. *Brown v. New Jersey*, 175 U. S. 172; *Bronson v. Kinzie*, 1 How. 311.

Whether the suit on the return bond was brought against the executors prematurely, is solely one of local practice and procedure which the Supreme Court of the Territory, in so far as this case is concerned, has approved. Such matters of local practice and procedure in territorial courts are not open for review here.

The statute of limitations commences to run as against a right of action for breach of the conditions of a replevin or delivery bond from the date of the judgment for a return of the property, which in this case was March 19, 1904 (Rec. 34); *Cobbey on Replevin* (2d ed.), §§ 1209, 1311, 1313, 1314 *et seq*; *Hagan v. Lucas*, 10 Pet. 40; *Lovejoy v. Bright*, 8 Blackf. 206; *Evans v. King*, 7 Missouri, 411; *Lockwood v. Perry*, 9 Met. 444; *Burkle v. Luce*, 1 Comstock (N. Y.), 163; *McRea v. McLean*, 3 Port. (Ala.) 138; *Delay v. Yost*, 59 Kansas, 496.

Mr. David L. Withington, with whom Mr. William R. Castle, Mr. A. W. Greenwell and Mr. Alfred L. Castle were on the brief, for defendants in error:

The sureties were discharged by the amendments increasing the valuation of the property and the recovery of judgment for the increased amount.

The foundation of the ancillary proceeding in which the bond was given was an affidavit in which the plaintiff fixes the actual value, and the contract was entered into with reference to the value so fixed. *Anderson v. Hapler*, 34 Illinois, 436; *S. C.*, 85 Am. Dec. 318; *Bardwell v. Stubbett*, 17 Nebraska, 485; *S. C.*, 23 N. W. Rep. 344; *Ah Leong v. Kee You*, 8 How. 416, 418; *Achi v. Alapai*, 9 Hawaii, 591,

592; *Smith v. Fisher*, 13 R. I. 624; *Simpson v. Wilcox*, 18 R. I. 40.

This is a statutory bond, into which all existing provisions of law enter, including that under which the plaintiff fixes the actual value on which the bond is conditioned. The sureties can rely upon this statutory provision, and in order to be bound to an increased value, or by subsequent legislation, the intent of the surety to be bound must appear on the face of the bond. *Sweeny v. Lomme*, 22 Wall. 208; *Douglass v. Douglass*, 21 Wall. 98; *Lee v. Hastings*, 13 Nebraska, 508.

The laws in force at the time and place of executing a contract, which affect the right of the parties thereto, enter into the contract and form a part of it, without any express stipulation to that effect. *Bronson v. Kinzie*, 1 How. 311; *Von Hoffman v. Quincy*, 4 Wall. 535; *West River Bridge v. Dix*, 6 How. 792; *Walker v. Whitehead*, 16 Wall. 314; *Barnitz v. Beverly*, 163 U. S. 118, 127.

In order to bind the sureties, the bond itself must show an intent to be bound by subsequent legislation as a part of the bond itself. *Miller v. Stewart*, 9 Wheat. 680; *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Powell*, 14 Wall. 493; *Mix v. Vail*, 86 Illinois, 40; *Berwick v. Oswald*, 3 El. & Bl. 653, 678.

The defendants' contract is to be strictly construed, and doubts are resolved in favor of the surety. *Smith v. United States*, 2 Wall. 219; *United States v. Price*, 9 How. 84, 91; *Crane v. Buckley*, 203 U. S. 441, 447; *United States v. Hough*, 103 U. S. 72; *Magee v. Life Ins. Co.*, 92 U. S. 93; *Prairie State Nat. Bank v. United States*, 164 U. S. 227; *United States v. Boecker*, 19 Wall. 652; *Stull v. Hance*, 62 Illinois, 52, 55; *Supt. Pub. Works v. Richardson*, 18 Hawaii, 523, 525.

The surety has a right to stand upon the exact terms of his contract. The actual value fixed by the affidavit was an exact term of his contract, made so by statute. A varia-

tion from this term is fatal to his liability. *Reese v. United States*, 9 Wall. 13; *Bierce v. Waterhouse*, 19 Hawaii, 398, 405; *Cross v. Allen*, 141 U. S. 528; *United States F. & G. Co. v. United States*, 191 U. S. 416; *Miller v. Stewart ubi supra*; *Leggett v. Humphreys*, 21 How. 66, 76; *Bauer v. Cabanne*, 105 Missouri, 110, 118, 119; *The State v. Medary*, 17 Ohio St. 554, 565.

A variation between the affidavit and the writ discharges the bail bond. *Robeson v. Thompson*, 9 N. J. L. 97. The plaintiff is estopped by its affidavit, on the faith of which the surety contracted. 1 Greenleaf on Evidence, 16th ed., §§ 22, 27, 122; *Parker v. Simonds*, 8 Met. 205, 212; *Kafer v. Harlow*, 5 Allen, 348; *Leighton v. Brown*, 98 Massachusetts, 515; *Huggeford v. Ford*, 11 Pick. 222, 223; *Swift v. Barnes*, 16 Pick. 194; *Iron Works v. Snow Plow Co.*, 48 Fed. Rep. 652; *Smith v. Packard*, 98 Fed. Rep. 793, 800; *Weyerhauser v. Foster*, 60 Minnesota, 223, 224; *S. C.*, 61 N. W. Rep. 1129; *Wiseman et al. v. Lynn*, 39 Indiana, 250, 259; *Trimble v. The State*, 4 Blackf. 435, 437; *Capital Lumbering Co. v. Learned*, 36 Oregon, 544, 548; *S. C.*, 59 Pac. Rep. 454; *Butts v. Woods*, 14 N. Mex. 187; 16 Pac. Rep. 617, 618; *Wells on Replevin*, §§ 251, 252, 453, 569, 660; *Tuck v. Moses*, 58 Maine, 461, 477.

The better rule is that any increase in the pecuniary obligation, without assent, discharges the surety. *Driscoll v. Holt*, 170 Massachusetts, 262; *Sage v. Strong*, 40 Wisconsin, 575; *Tyler Mining Co. v. Last Chance Min. Co.*, 90 Fed. Rep. 15.

An increase even of the *ad damnum* of a writ discharges the sureties on an appeal bond. *Langley v. Adams*, 40 Maine, 125; *Moss v. Sleeper*, 58 Maine, 331; *Ruggles v. Berry*, 76 Maine, 262.

The construction put upon the local statute by the local court should be persuasive, if not controlling, in this court. *Bierce v. Waterhouse*, 19 Hawaii, 398, 408; *Kealoha v. Castle*, 210 U. S. 149, 153; *Kawananakoa v. Polyblank*,

205 U. S. 349; *Copper Queen Mining Co. v. Arizona*, 206 U. S. 474.

The sureties cannot be held under a subsequent amendment of the organic act granting an appeal to this court. The petition for rehearing pending in the Supreme Court would not have authorized an appeal, although acted on after March 3. *Harrison v. Magoon*, 205 U. S. 501.

The alleged judgment of the Supreme Court of Hawaii, entered, in effect, *ex parte*, is without authority of law. *Cotton v. Hawaii*, 211 U. S. 162; *Hutchins v. Bierce*, 211 U. S. 429; *Bierce v. Waterhouse*, 19 Hawaii, 594.

All the proceedings subsequent to the denial of the petition for rehearing are *coram non judice*. *Meheula v. Pioneer Mill Co.*, 17 Hawaii, 91; *Water Works Co. v. Oshkosh*, 106 Wisconsin, 83; *S. C.*, 187 U. S. 437.

If the amendment to the organic act applied, then the granting of the new right of appeal to another jurisdiction extended the liability of the surety, exposed him to the judgment of a court, with reference to which he did not contract, and imposed upon him a new pecuniary obligation, viz.: the costs of that court.

Under this rule, stay laws have been held to impair contract rights. *Aycock v. Martin*, 37 Georgia, 124. So repealing the right to levy a tax for the payment of bonds. *Seibert v. Lewis*, 122 U. S. 284; *Shapleigh v. San Angelo*, 167 U. S. 646. So of taxation to satisfy judgments. *Butz v. Muscatine*, 8 Wall. 583. Nor can the place of payment be changed. *Dillingham v. Hook*, 32 Kansas, 189. So of the obligation to receive coupons for taxes. *McGahey v. Virginia*, 135 U. S. 693. So of laws affecting judgments and executions. *Christmas v. Russell*, 5 Wall. 290; *Daniels v. Tearney*, 102 U. S. 419. A power of sale mortgage cannot be affected by changing the right of redemption or the power of sale. *Clark v. Reyburn*, 8 Wall. 332; *Brine v. Insurance Co.*, 96 U. S. 627. It is not a question of degree, or manner, or cause, but an encroachment in any respect

on its obligation dispensing with any part of its force. *Planters' Bank v. Sharp*, 6 How. 301; *Phinney v. Phinney*, 81 Maine, 450; *McCurdy v. Brown*, 8 Missouri, 550; *Schuster v. Weiss*, 114 Missouri, 158; *State v. Roberts*, 68 Missouri, 234; *Nofsinger v. Hartnett*, 84 Missouri, 549.

An injunction bond is construed with reference to the statute in force. A statute passed but not in effect does not become a part of the contract. *Mix v. Vail*, 86 Illinois, 40; see also *Alwood v. Mansfield*, 81 Illinois, 314; *Lapsley v. Brashears*, 4 Litt. (Ky.) 47; *Blair v. Williams*, 4 Litt. (Ky.) 34; *Haldeman v. Powers*, 103 Kentucky, 525; 45 S. W. Rep. 662; *Aeusch v. Demass*, 34 Michigan, 95; *Stockwell v. Kemp*, 4 McLean, 80; *S. C.*, 23 Fed. Cas. No. 115; *Woodson v. Johns* (Munf.), 18 Virginia, 230; *Jeter v. Langhorne*, 5 Gratt. 193; *Bailey v. McCormick*, 22 W. Va. 95; *Winston v. Reeves* (Ala.), 4 Stewart & Porter, 269.

The sureties cannot be held under the act of 1903, chapter 32, §§ 17, 18 and 19; Rev. Laws, 1905, §§ 1861, 1864, 1865, since that did not go into force until after the execution of the bond. As the act does not apply to this case, the action was prematurely brought.

The return of the property satisfied the obligation of the bond; or, if not sufficient to satisfy the bond, the offer to return, coupled with failure to accept or reject, discharged the surety. *Stevens v. Tuile*, 104 Massachusetts, 328, 332; *Leonard v. Whitney*, 109 Massachusetts, 265; *Walko v. Walko*, 64 Connecticut, 74; *S. C.*, 29 Atl. Rep. 243; 28 Am. & Eng. Enc. of Law, 34, 38, 40; *Dresel v. Jordan*, 104 Massachusetts, 407.

MR. JUSTICE LURTON, after making the above statement, delivered the opinion of the court.

The right to have this judgment reviewed by this court involves the review of the judgment upon which the mandate issued, and necessarily brings here the first as well as

the second bill of exceptions and transcript as one case. As it appears from the first bill of exceptions and the opinion and judgment in that case that the plaintiffs in error in that case, the defendants in error here, had taken many exceptions to the judgment against them which were not passed upon by the Supreme Court of the Territory, it must follow that if we shall find that that court erred in reversing the judgment upon the single error considered that the other exceptions and errors not considered are now open for review, inasmuch as the judgment might have been reversible for other errors not considered. The practice adopted by the Supreme Court of the Territory of passing without deciding other errors assigned upon a judgment is not approved, since it is likely to involve further review proceedings and duplicate appeals. Especially is this so in cases which are subject to the appellate jurisdiction of this court. The single ground upon which the Supreme Court of Hawaii reversed the judgment in favor of the Bierce Company and against the executors of the surety upon the return bond made by the defendants in the replevin suit was that by two amendments made to the declaration in the replevin suit the value of the property which the plaintiff sought to reclaim was increased from \$15,000 to \$22,000, whereby, as the court below held, the liability of the sureties was enlarged beyond their undertaking. The effect of this was held to discharge the sureties. In this we think the court erred.

The plaintiff, to make out its case, introduced in evidence, together with other matters, the pleadings, the judgment, the return of the sheriff upon the execution for a return of the property unsatisfied, and the return bond. The judgment, as before stated, was for a return of the property and costs, and \$1,045 damages for detention, and, in default of a delivery of the property, that the defendant Hutchins, trustee, pay the value thereof, found to be \$22,000, for which there was judgment.

The penalty of the return bond was \$30,000. The damages laid in the complaint, as amended, were \$28,156.74, and the judgment in the trial court upon the verdict was for the full damages claimed.

At the close of all the evidence the defendants moved the court to instruct a verdict for the defendants. This motion was based upon several grounds. The principal one was that the transcript of the record in the replevin action showed, *a*, that the plaintiff in that action had in the affidavit required by § 2102, R. L. Hawaii, executed before the issuance of the writ of replevin, stated the value of the property claimed to be \$15,000; *b*, that the penalty of the replevin bond was in double this value; *c*, that the return bond recited that the value of the property claimed had been stated in the complaint in the replevin proceeding to be \$15,000; *d*, that the complaint had been subsequently amended so as to state the actual value to be \$20,000, and a second time amended so as to state the actual value to be \$22,000; and that the legal effect of these amendments was to release and discharge the sureties.

The motion for an instructed verdict was overruled and the case submitted to the jury, who found the actual value of the property claimed to be \$22,000, and for this there was an alternative judgment, as stated before.

After verdict the defendants moved a judgment *non obstante veredicto* upon like grounds. This too was denied.

On the appeal of the defendant to the Supreme Court of Hawaii the action of the trial court in allowing the amendment of the complaint so as to increase the value of the property in the manner stated was assigned as error. Upon this matter the Supreme Court said:

"The only exceptions to rulings prior to the judgment on which the defendant relied in argument are (1) to allowing the plaintiff to amend its complaint by changing the averment of the value of the property, first from \$15,000 to \$20,000, and then to \$22,000. . . .

"The amendments were properly allowed under the statute (sec. 1738, R. L.). Before the property was delivered to the plaintiff the defendant obtained a return of it to himself upon his statutory bond in double the value of the property as originally stated by the plaintiff. It does not appear that the defendant's rights were affected by the amendment increasing the value." *Bierce v. Hutchins*, 18 Hawaii, 511, 522.

This brings us to the proposition as to whether a question thus once litigated and decided in the replevin suit is open for relitigation by the surety when sued upon the return bond. The surety on such a bond given in the course of a judicial proceeding is represented in that proceeding by his principal. That the court possessed the power of allowing an amendment which introduced no new cause of action is plain. The surety became such in contemplation of the possible exercise of that power. The penalty of the bond was not exceeded, and an increase in the *ad damnum* did not introduce a new cause of action. *Townsend National Bank v. Jones*, 151 Massachusetts, 454. By the execution of the bond the surety consented to become responsible to the amount of the penal sum therein named.

The only possible objection lay in the question as to whether the plaintiff was estopped from laying the damages in excess of the value of the property stated in the original complaint or affidavit. There are cases which hold that in the replevin action the plaintiff, having himself fixed the value of the property claimed by an affidavit, is estopped thereby from showing that it is of a less value, if he failed in his suit, though the defendant may show, if he can, that it was of a greater value. *Washington Ice Co. v. Webster*, 125 U. S. 426. But we are not disposed to think that a plaintiff in such a suit may not show, especially when, as here, the defendant upon a return bond was suffered to retain the possession, that he had mistakingly

219 U. S.

Opinion of the Court.

undervalued the property. We have been cited to no authorities which extend the principle of estoppel to shut out such an amendment of the *ad damnum* clause of the complaint in a replevin action. However this may be, the questions were directly in issue in the replevin suit and decided against the defendant therein.

One who becomes a surety for the performance of the judgment of a court in a pending case is represented by his principal and is bound by the judgment against his principal within the limits of his obligation. *Washington Ice Co. v. Webster*, 125 U. S. 426, 444, 446; *Stovall v. Banks*, 10 Wall. 583.

The issue as to whether the value of the property re-delivered to the defendants was greater than alleged in the plaintiffs' affidavit and claimed in the original complaint, as well as whether the amendment of that complaint was such as to change the cause of action, were issues made and decided against the principal in the bond upon which the sureties were bound and cannot be relitigated, in the absence of fraud and collusion, by a surety when sued upon the bond. *Townsend National Bank v. Jones*, 151 Massachusetts, 454, 459; *Greenlaw v. Logan*, 2 Lea (Tennessee), 185; *Kennedy v. Brown*, 21 Kansas, 171; *Hare v. Marsh*, 61 Wisconsin, 435; *Mason v. Richards*, 12 Iowa, 74.

The motion of the executors of Waterhouse in the trial court for a judgment *non obstante veredicto* was predicated upon several distinct grounds. To the action of the trial court in overruling this motion exceptions were duly taken, and this action was made the subject of distinct assignments of error upon the writ of error to the Supreme Court of Hawaii. That court, as we have already seen, considered only such of the grounds relied upon as raised the question of the effect of the increase of the plaintiff's *ad damnum* clause from \$15,000 to \$22,000. Concluding that the necessary legal effect of that amendment of the com-

plaint was to relieve the sureties upon the return bond, it reversed the judgment and remanded with direction to give judgment for the said executors, notwithstanding the verdict against them. See 19 Hawaii, 398.

The learned counsel for the executors have insisted that if we shall conclude that the action of the Supreme Court of Hawaii is not to be supported upon the single ground considered by it, that it is then the duty of this court to consider the grounds for the motion not passed upon, and if upon any one of them the judgment of the Supreme Court of Hawaii may be sustained, its judgment should not be disturbed. Upon this contention each of the several grounds upon which such motion was based has been covered by the briefs filed by the present defendants in error.

Among the grounds for a judgment notwithstanding the verdict, not considered, was, that the judgment of the Supreme Court of Hawaii reversing the judgment in favor of William Bierce, Limited, against Hutchins, trustee, was final as to the surety upon the return bond, and was not subject, so far at least as the surety was concerned, to be reviewed or set aside by any writ of error to this court, and that the judgment of this court, 205 U. S. 340, reversing the judgment of the Hawaiian Supreme Court, should not in anywise affect the present defendants in error as representatives of Waterhouse, one of the sureties upon the return bond. But the judgment of the Hawaiian Supreme Court was not final prior to the act of Congress referred to. It is true that the opinion of the Hawaiian Supreme Court reversing the judgment of the Hawaiian Circuit Court was filed on January 28, 1905, a date prior to the act of Congress referred to. But the record shows that thereupon a petition for rehearing was filed, and that a rehearing was denied April 29, 1905 (see *Bierce v. Hutchins*, 16 Hawaii, 717), and that the final judgment, which was reversed by this court, was not rendered until May 6, 1905, a date after the law referred to. The effect of the pending peti-

tion for a rehearing, if filed in due time and entertained by the court, as was the case, was to prevent the judgment from becoming final and reviewable until disposed of. *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31; *In re McCall*, 145 Fed. Rep. 898. Since, therefore, there was no final judgment prior to the going into effect of the act of Congress of March 3, 1905, the pending litigation was subject to the power of Congress to allow a review after final judgment, although no such review had theretofore been admissible. No fundamental right was thereby denied, and the bond must be regarded as having been entered into subject to such change in remedy or procedure as did not change the contractual rights of the parties.

It is next claimed that this action upon the return bond was premature, because started during the pendency of the defendants' writ of error in the Supreme Court of Hawaii from the judgment in the replevin case. But that writ did not annul the judgment. The Hawaiian act of 1903, ch. 32, §§ 17, 18 and 19, Rev. Laws of Hawaii, 1905, §§ 1861, 1864 and 1865, provided for the issuance of an execution if the defendant should be ruled to give a new return bond upon an affidavit of insufficiency. This was done and the objection of the defendant overruled. An execution issued, which was duly returned unsatisfied. The contention that this act of 1903 did not go into force until after the execution of the return bond has no merit. Such a bond is always entered into subject to the possibility of changes in the law of procedure which do not change the contract. The defendant refused to give the new bond required and, under the act referred to, an execution was issued, which was returned unsatisfied. This fact authorized an immediate suit upon the return bond. There was no error in holding that the suit was not premature under the act referred to.

Another group of assignments relate to an alleged tender of redelivery of the property by Hutchins, trustee, after

the judgment requiring a return. The insistence was and is that there should have been a directed verdict for the defendant upon the evidence showing such tender and a rejection by the plaintiff. The letter in evidence making a tender was not an unequivocal tender. There was also evidence tending to show the existence of obstacles to a repossession, which it was the duty of the defendant to have removed; and also evidence of a conveyance by the defendant of record, which clouded the title. There was an absence of evidence tending to show any active exertion to restore the plaintiff's possession, and no evidence that the plaintiff was ever actually put in repossession. The question was one for the jury, who found for the plaintiff. The charge was full and fair.

There were a vast number of errors assigned. We have referred to those which were either pressed in argument or have otherwise been deemed of such importance as to require particular notice. Those not referred to have been considered, with the result that we find none of them well taken.

The conclusion we reach is that the judgment of the Supreme Court of the Territory of Hawaii, reversing the judgment of the Circuit Court and directing a judgment *non obstante veredicto*, was erroneous. The second judgment, affirming the judgment of the Circuit Court upon its mandate, is also erroneous.

The case must be remanded, with direction to set both judgments aside and affirm the judgment of the trial court in favor of the plaintiff William W. Bierce, Limited.

Reversed.